No. 3042

United States
Circuit Court of Appeals

For the Ninth Circuit.

HELEN K. KINNEY,

Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

In the Supreme Court of the Territory of Hawaii.

(Stamped $2.00.)

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant and Defendant in Error.

Petition for Writ of Error.

The plaintiff and plaintiff in error in the above-entitled cause, feeling herself aggrieved by the decision and judgment entered therein on the 14th day of February, 1917, by the Circuit Court of the First Circuit, Territory of Hawaii, comes now by Castle & Withington and W. C. Achi, her attorneys, and petitions this court for an order allowing said plaintiff and plaintiff in error to prosecute a writ of error to the said Circuit Court out of this court; and also that an order be made fixing the amount of security which the plaintiff and plaintiff in error shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in said court shall be suspended and stayed until the determination of the said writ of error by this Court.

And your petitioner will ever pray.

(S.) CASTLE & WITHINGTON,

(S.) W. C. ACHI,

Attorneys for Plaintiff and Plaintiff in Error. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the Supreme Court of the Territory of Hawaii.

(Stamped $1.00.)

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant and Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Helen K. Kinney, plaintiff and plaintiff in error in the above-entitled action, of Honolulu, in the City and County of Honolulu, Territory of Hawaii, as principal, and S. M. Kanakanui and Henry G. Winkley, both of said Honolulu, as sureties, are held and firmly bound unto the above-named Oahu Sugar Company, Limited, defendant and defendant in error, in the sum of Five Hundred Dollars ($500) to be paid to the said Oahu Sugar Company, Limited, defendant and defendant in error, its successors and assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 19th day of February, 1917.

WHEREAS, the above-named plaintiff and plaintiff in error has prosecuted a writ of error to the Supreme Court of the Territory of Hawaii to reverse the judgment rendered in the above-entitled

[2] action by the said Circuit Court of the First Circuit, Territory of Hawaii, on the 14th day of February, 1917;

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff and plaintiff in error shall pay the judgment so rendered in said Circuit Court of the First Circuit in case it shall fail to sustain its writ of error, then this obligation shall be void; otherwise to remain in full force and effect.

Honolulu, February 19th, 1917.

(S.) MRS. HELEN K. KINNEY.
(S.) S. M. KANAKANU.
(S.) HENRY G. WINKLEY.

In the above-entitled matter, the amount of the bond is fixed at Five Hundred Dollars, and the foregoing bond is approved.

(Sig.) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii. [3]

In the Supreme Court of the Territory of Hawaii.

IN ERROR TO THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII.

HELEN K. KINNEY,
Plaintiff and Plaintiff in Error,
vs.
OAHU SUGAR COMPANY, LIMITED, a Corporation,
Defendant and Defendant in Error.

Assignment of Errors.

Now comes the plaintiff and plaintiff in error, and, for assignment of errors, alleges that the Circuit Court of the First Circuit, Territory of Hawaii, committed error in its judgment as follows, to wit:

I.

That the said Court erred in its decision and judgment in finding and deciding that the defendant is entitled to judgment, since the decision of the Court shows that the plaintiff is entitled to a judgment that she is the owner and entitled to the possession of and the mesne profits of one-third of the premises described in the complaint.

II.

That the said Court erred in failing to find, decide and adjudge on the facts found by it that the plaintiff is entitled to the possession of one-third of the premises described in the complaint and to the mesne profits of the same since June 8, 1914. [4]

III.

That the said Court erred in holding that the intention of the testatrix, Bernice Pauahi Bishop, was that Kahakuakoi and Kealohapauole should take an estate of inheritance by the entirety, which, if not conveyed by the joint act of the couple during life, should descend to the children of the couple, and/or the children of either of the couple, in case either had children by another, in direct and lineal descent forever; and, in case of a default in such lineal descendants, then to the trustees; in that an estate by the entirety which passes to the children of the deceased spouse, not children of the surviving spouse, would

not be an estate of inheritance by the entirety, and, second, that it is an erroneous construction of the will to hold that in case such an estate, at the decease of the survivor, was to pass to persons not the heirs or the heirs of the body of the survivor, such estate would pass by descent, and, likewise, it is erroneous to hold that there is anything in the will showing an intention that there was a condition that the estate should pass only in case it was not conveyed by the joint act of the couple during life.

IV.

That the Court erred in holding that the testatrix meant to give to Kahakuakoi and Kealohapauole something more than a life estate, and that she meant to give them an estate of inheritance and that she intended to create an estate in fee tail, particularly in that it is shown by the will and found by the Court that the testatrix intended that the estate, at the death of the survivor of the tenant by the entirety, should pass in certain contingencies to persons not the heirs or heirs of the body of said survivor. [5]

V.

That the said Court erred in holding that in case the testatrix intended to create an estate in fee tail, which is not enforceable under the law of Hawaii, that the Court should declare that the devise created a fee simple, in that it appearing from the decision of the Court and from the will that interests were given to others than the heirs or heirs of the body of the surviving tenant by the entirety, the devise should be held to create a life estate in Kahakuakoi and Kealohapauole by the entirety, with a contingent remainder to the heirs of the body of either, and

that therefore the plaintiff, found to be such heir of the body to one-third, is entitled to one-third of said devise.

VI.

That the said Court erred in holding that the words "heirs of the body of either," coupled with the devise over to the Trustees, changing the course of descent, are not controlling in the determination of the intention of the testatrix, and in holding that they are merely a part of the evidence and do not control, in that said words do manifest an intention of the testatrix inconsistent with a devise in fee simple.

VII.

That the said Court erred in not finding and rendering judgment for the plaintiff for one-third of the premises as prayed for, and in not finding for the plaintiff in the amount of damages claimed in the complaint.

WHEREFORE, the plaintiff and plaintiff in error prays that the judgment of said Circuit Court may be reversed, and that the said Court be directed to enter judgment for the plaintiff and plaintiff in error for the one-third of the premises in issue [6] upon the facts found, and that the said Court be directed to ascertain and find the amount of damages to which the plaintiff and plaintiff in error is entitled.

Dated February 19th, 1917.

(S.) CASTLE & WITHINGTON and
(S.) W. C. ACHI,

Attorneys for Plaintiff and Plaintiff in Error.

To Oahu Sugar Company, Limited, Defendant and Defendant in Error, and to Messrs. Frear, Prosser, Anderson & Marx and Thompson, Milverton & Cathcart, Its Attorneys:

Please take notice that a writ of error has issued in this action.

(S.) CASTLE & WITHINGTON and
(S.) W. C. ACHI,
Attorneys for Plaintiff and Plaintiff in Error.

[7]

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plff. and Plff. in Error, vs. Oahu Sugar Co., Ltd., Deft. and Deft in Error. Petition for Writ of Error, Writ of Error, Bond on Writ of Error and Assignment of Errors. Filed February 19, 1917, at 9:50 A. M. J. A. Thompson, Clerk. [8]

In the Supreme Court of the Territory of Hawaii.

(Stamped $2.00.)

HELEN K. KINNEY,
Plaintiff and Plaintiff in Error,
vs.
OAHU SUGAR COMPANY, LIMITED, a Corporation,
Defendant and Defendant in Error.

Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy:

YOU ARE COMMANDED to summon Oahu

Sugar Company, Limited, a corporation, defendant in error, to appear before the Supreme Court of the Territory of Hawaii within twenty (20) days after service hereof, to answer the annexed Petition for Writ of Error, Assignment of Errors and Notice of Helen K. Kinney, plaintiff and plaintiff in error, and have you then there this Writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 19th day of February, 1917.

[Seal] J. A. THOMPSON,
Clerk. **[9]**

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plaintiff and Plaintiff in Error, vs. Oahu Sugar Company, a Corporation, Defendant and Defendant in Error. Summons Issued at 9:50 o'clock A. M., February 19, 1917. J. A. Thompson, Clerk.

Received Sheriff's Office, Feb. 19, 10:55 A. M. 1917. Honolulu. J. S. Kalakiela. P. J. F. Hackfeld, T. Geo. Rodiek, S. J. F. C. Hagens.

Returned at 1:46 o'clock P. M., February 20, 1917. J. A. Thompson, Clerk.

Served the within Summons as follows:

On Oahu Sugar Company, Limited, a corporation, through George Rodiek, its Treasurer, therein named the defendant in error, at Honolulu, this 19th day of February, A. D. 1917, by delivering to him a certified copy thereof and of the Petition for Writ of Error, Assignment of Errors, Bond and notice annexed

hereto, and at the same time showing him the original.

Dated Honolulu, Feb. 19, 1917.

DICK K. DIAMOND,
Police Officer. [9½]

In the Supreme Court of the Territory of Hawaii.

(Stamped $2.00.)

HELEN K. KINNEY,
Plaintiff and Plaintiff in Error,
vs.
OAHU SUGAR COMPANY, LIMITED, a Corporation,
Defendant and Defendant in Error.

Writ of Error.

To Henry Smith, Clerk of the Circuit Court of the First Circuit, Territory of Hawaii:

WHEREAS, in an action lately pending before the Circuit Court of the First Circuit, Territory of Hawaii, in which Helen K. Kinney is plaintiff and the Oahu Sugar Company, Limited, is defendant, error is alleged to have occurred, as appears by the assignment of errors on file in this court.

You are commanded forthwith to send up to this court the record and all exhibits filed in said proceeding.

WITNESS the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court of the Territory of Hawaii.

[Seal] J. A. THOMPSON,
Clerk.

Honolulu, February 19th, 1917.

Received the foregoing Writ of Error on this 19 day of February, 1917.

HENRY SMITH,
Clerk Circuit Court, First Circuit.

Circuit Court, First Jud. Circuit. Feb. 19, 1917.

[10]

In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above-mentioned cause. Said record being specifically stated in the certificate of the clerk attached to the certified records or pleadings.

HENRY SMITH,
Clerk, Circuit Court, First Circuit, Territory of Hawaii.

Dated at Honolulu, Oahu, H. T., March 5th, 1917.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. October Term, 1916. Helen K. Kinney, Plaintiff and Plaintiff in Error, vs. Oahu Sugar Company, Limited, a Corporation, Defendant and Defendant in Error. Writ of Error. Filed and Issued February 19, 1917, at 9:50 A. M. J. A. Thompson, Clerk. Returned March 5, 1917, at 2:00 P. M. J. A. Thompson, Clerk. 8487. **[11]**

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

JANUARY TERM, A. D. 1916.

(Stamps $2.)

EJECTMENT.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR CO., LIMITED, a Corporation,

Defendant.

Complaint.

To the Honorable the Presiding Judge of the First Judicial Circuit, of the Territory of Hawaii.

The undersigned complains of the Oahu Sugar Company, Limited, a corporation duly created and existing under the Laws of the Territory of Hawaii, defendant, that it has unjustly, and contrary to law and the rights of the plaintiff, taken into its possession and converted to its use and occupation, that certain piece or parcel of land situated at Hanohano. Ewa, City and County of Honolulu, Territory of Hawaii, and being a part of those premises described in Land Commission Award Number 5930 to Puhalahua; and more particularly described as follows, to wit:

"Beginning at a marked rock near the Waigele River, at the mauka corner of Ullumalu; the boundary runs by the magnetic meridian as follows:

N 2° 00′ E 594 feet along Aulii Grant 712.
N 60° 00′ W 1346 " " " " "
N 68° 00′ W 264 " " " " "
N 24° 00′ W 726 " " " " "
N 4° 00′ W 792 " " " " "
N 24° 00′ W 396 " " " " "
N 34° 30′ E 924 " " " " "
N 8° 30′ W 1399 " " " " "
N 25° 00′ E 670 " " " " "
N 30° 00′ W 1023 " " " " "
N 39° 00′ W 264 " " " " "

along Pali to the rock called "Uhakai" at the junction of the Kipapa and Keaakukui gulches;

N 7° 00′ W 300 feet more or less, down the pali to a point in the gulch or the boundary of Pouhala;

S 19° 00′ W 950 feet more or less across the stream and up the pali to a point on the west bank of the Keaakukui gulch, on the boundary of Pouhala;

S 12° 30′ W 914 feet along R. P. 4486 along Pali
S 13° 30′ E 755 " " the same;
S 14° 30′ W 1463 " " " "
S 23° 00′ E 1036 " " " "
S 17° 30′ E 235 " " " "

to a marked rock on the edge of the Pali Pohakupili;

N 79° 00′ E 231 feet down to marked rock at the foot of the pali at the bend of the river along Waipahu Gr. 122, thence along the river which separates this land from Waipahu to the initial point; Area 145 4/10 acres. [12]

The plaintiff claims an undivided one third of the above-described premises as an heir at law of one John Paalua a grandson of Kahakuakoi and Kealohapauole; said John Paalua was an heir of the bodies of said Kahakuakoi and Kealohapauole, the devisees under the will of Bernice Pauahi Bishop, deceased, at the time of his death; and further the plaintiff claims the said one undivided third of said land by virtue of the terms of said will of Bernice Pauahi Bishop; the plaintiff was a granddaughter of said Kahakuakoi and Kealohapauole, the devisees as aforesaid; and that she is an heir of the bodies of said Kahakuakoi and Kealohapauole deceased; to be the damage of the plaintiff in the sum of Ten Thousand Dollars.

WHEREFORE, the plaintiff asks the process of this Court, to cite the said defendant to appear and answer this complaint before a jury of the country at the January term, 1916, of this Court unless sooner disposed of by judicial authority, and that the plaintiff may have restitution of said property, with damages for its detention, and for costs of this Court.

(Signed.) HELEN K. KINNEY,
Plaintiff.

Territory of Hawaii,
City and County of Honolulu,—ss.

Helen K. Kinney, being duly sworn, deposes and says: That she is the plaintiff named in the above-entitled matter; that she has read the foregoing complaint and knows the contents thereof, and that the same are true to the best of her knowledge and belief.

(Sgd.) HELEN K. KINNEY.

Subscribed and sworn to before me this 23d day of May, A. D. 1916.

[Seal] (Sgd.) F. W. McKINNEY,
Notary Public First Judicial Circuit Territory of Hawaii. [13]

[Endorsed]: No. ——. Circuit Court, First Circuit, Territory of Hawaii. January Term 1916. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Limited, a Corporation, Defendant. Ejectment. Complaint. Filed at 10:25 o'clock A. M. May 24th, 1916. (Sgd.) J. A. Dominis, Clerk. [14]

In the Circuit Court of the First Circuit, Territory of Hawaii.

Holding Terms at ———, County of ———.

($2.00 Stamps.)

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR CO., LIMITED, a Corporation,
Defendant.

Term Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy, or any Police Officer:

YOU ARE COMMANDED to summon the Oahu Sugar Co., Limited, a corporation, defendant, in case

it shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, to wit, The January 1917 term thereof, to be holden at The City and County of Honolulu, on Monday, the 10th day of January next, at 10 o'clock A. M., to show cause why the claim of Helen K. Kinney, Plaintiff should not be awarded to her pursuant to the tenor of her annexed Complaint.

And have you then there this Writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit at Honolulu aforesaid, this 24 day of May, 1916.

[Seal] (Signed.) J. A. DOMINIS,
Clerk.

[Endorsed]: L. No. 8487. Reg. 5, p. 453. Circuit Court, First Circuit. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Co., Limited, a Corporation, Defendant. Term Summons Issued at 10:25 o'clock A. M., May 24, 1916. (Signed.) J. A. Dominis. Clerk. Received at 3:45 P. M. May 24th, A. D. 1916. (S.) P. Gleason, Deputy High Sheriff. Returned at 1:45 o'clock P. M., May 26, 1916. (S.) J. A. Dominis, Clerk.

Served the within Summons as follows:

On Oahu Sugar Co., Limited, a corporation therein named as defendant, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 25th day of May, A. D. 1916, by delivering to J. F. C. Hagens its Secretary, a certified copy hereof and of the petition or complaint hereto annexed and at the same time showing him the original.

Dated Honolulu, May 25, 1916.

(S.) PATRICK GLEASON,
Deputy High Sheriff. [15]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

EJECTMENT.

HELEN W. KINNEY,
Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation.
Defendant.

Answer.

Now comes Oahu Sugar Company, Limited, the defendant in the above-entitled action, and for answer to the complaint of the above-named plaintiff filed in the above-entitled court and cause, denies the truth of each and every allegation in said complaint contained.

And for further answer to said complaint the said defendant alleges:

1. That the cause of action alleged in said com-

plaint did not accrue within ten (10) years before the commencement of said action, and that all of the rights, if any, of the said plaintiff in and to the premises described in said complaint, or any part thereof, are barred by the statute of limitations of the Territory of Hawaii.

2. That the said defendant and its predecessors in title and interest, ever since the 28th day of January, A. D. 1893, have been in the continuous occupation and possession of the premises described in said complaint, and have held the same ever since said date under claim of title in fee simple, openly and notoriously, exclusive of all other rights, and adversely to the said plaintiff, and to the world. [16]

WHEREFORE said defendant prays that said action be dismissed, and for its costs and disbursements in said action.

Dated at Honolulu, this 23d day of June, A. D. 1916.

OAHU SUGAR COMPANY, LIMITED,
Defendant Above Named.
By THOMPSON, MILVERTON & CATHCART,
Its Attorneys.
(Sig.) FREAR, PROSSER, ANDERSON & MARX, of Counsel.

[Endorsed]: L. No. 8487. Reg. 5, pg. 453. No. ——. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Limited, a Corpora-

tion, Defendant. Answer. Filed at 9:25 o'clock A. M. June 24th, 1916. (S.) J. A. Dominis, Clerk. [17]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

LAW NO. 8487.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

Decision.

This is an action in ejectment to recover a certain piece of land known as Hanohano, situated in Ewa, Island of Oahu.

The plaintiff claims an undivided one-third in said lands as the sole heir at law of one Niulii (w) and Kahaleahu (k), her husband. Niulii, according to the plaintiff's claim, was one of three children of Kahakuakoi and Kealohapauole, her husband, the devisees of the land from Pauahi.

The defendant claims the land as purchaser from one Mark P. Robinson, who purchased the land in foreclosure proceedings on a mortgage given by Kahakuakoa and Kealohapauole during their lifetime, and who also took a quitclaim deed from them and from the surviving two children of this couple, Lydia Kamae (now Mahoi) and George Kealohapauole.

The case was tried jury waived. Under such circumstances I conceive it to be the prime duty of the Court to carefully weigh the evidence and with the nicest exactitude decide the questions of fact involved. His errors of law may be easily and expeditiously reviewed and corrected in a court of appeal; his findings of fact, unless founded on no evidence or on evidence erroneously admitted, are final to the same extent as [18] a verdict of a jury.

Let us therefore first address ourselves to the single question of fact involved, namely, whether or not the plaintiff, admitted to be the child of Niulii, is also the child of Kahaleahu. We will then turn to the questions of law arising.

Certain facts are either admitted, uncontested or so clearly proven by the testimony that there is little difficulty in making findings thereon. They are these:

That Kahakuakoi was a relative of Pauahi. The degree of relationship is not material, but is classed under the same generic Hawaiian term, which is best translated "cousin."

That Kahakuakoi was always treated by Pauahi as a relative, living under Pauahi as one of her numerous retainers at the place known as Aikupika, with other retainers, relatives and servants of Pauahi.

That Kahakuakoi was married to one Kealohapauole and by him had three children, namely, Niulii, Lydia and George.

That Kahakuakoi died September 8, 1910, and Kealohapauole, her husband, died June 8, 1914; that

at the time of the death of Kealohapauole two children of Kahakuakoi and Kealohapauole survived them, namely, George Kealohapauole (or, as he was also known, George Kawelookalani) and Lydia Kamae.

That Niulii was a sister of George and Lydia, last-above named, and that she died on December 12, 1890, leaving surviving her three children, namely, Helen Kalolowahilani, who is the plaintiff herein, John Paalua, and David Kauluhaimalama.

That John Paalua died on or bout February 12, 1915, leaving no issue, nor wife, nor mother, nor father.

That David Kauluhaimalama died December 1, 1909, leaving no issue, nor wife, nor mother, nor father. [19]

It would, therefore, appear that at the death of Kealohapauole, who survived his wife, there survived him George Kealohapauole, Lydia Kamae, and the children of Niulii, namely, Helen and John. At the institution of this action on May 24, 1916, the interests of John would have passed to Helen if she was capable of inheriting the same. She would, under such circumstances, be entitled to an equal share with each, George Kealohapauole and Lydia Kamae (now Lydia K. Mahoi).

That by the will of Pauahi (Mrs. Bernice Pauahi Bishop) there was a bequest and devise to Kahakuakoi and Kealohapauole, her husband, under the following terms:

> "Fifth: I give and bequeath unto Kahaquakoi (w) and Kealopauole, her husband, and to

the survivor of them the sum of thirty dollars ($30) per month (not $30 each) so long as either of them may live. And I also devise unto them, and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue to go to my trustees upon the trusts below expressed."

And by the 11th paragraph of the first codicil to this will it is provided:

"11th. I revoke so much of the fifth article of my said will as devises the land known as 'Mauna Kamala' to Kahuakoi (w) and Kealohapauole, her husband, and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."

That in January, 1890, Kahaquakoi and Kealohapauole made a lease of the land of Hanohano to Mark P. Robinson for the term of fifty years from January 1, 1892.

That on December 15, 1890, Kahakuakoi and Kealohapauole gave a mortgage on the land in question to Messrs. Bishop, Paty and Damon, doing business as Bishop & Company; that this mortgage was assigned to one Peter Dalton and that this mortgage was duly foreclosed and the land sold on foreclosure sale to C. R. Bishop. [20]

That C. R. Bishop, by deed of October 23, 1894, conveyed the land to Mark P. Robinson by quitclaim deed; that Mark P. Robinson, by warranty deed of February 12, 1897, conveyed the land to the Oahu Sugar Co., Ltd., the defendant herein.

That by quitclaim deed dated October 2, 1894, Kahakuakoi, Kealohapauole, George Kealohapauole, and Lydia Kamae, under a consideration named as five dollars, quitclaimed all their interest in the land to Mark P. Robinson.

But it is claimed that the plaintiff herein is not the child of Kahaleahu, the husband of Niulii, and is, therefore, not the legitimate child of Niulii. As both sides seem to admit that the words "heirs of the body" and "issue" include only legitimate children, this becomes the one great question of fact in the case. On this issue of fact evidence was taken almost continuously from November 27, 1916, to January 2, 1917. On this question and on attempts to impeach witnesses testifying to this question forty-nine witnesses were examined. On this question counsel spent nearly four days in summing up. It is manifestly impossible, within the limits of this decision, to attempt to review the testimony or the arguments of counsel.

In order for plaintiff to win in this branch of the case it is necessary for her to show either (1) that Kahaleahu and Niulii were married and that she was born in wedlock, or (2) that she is the child of Kahaleahu and that he subsequently married Niulii, her mother.

There is no record, direct or specific proof of that marriage, either before or after the birth of the plaintiff. She must, therefore, rely on testimony of cohabitation and reputation and on declaration of marriage to prove the same.

It cannot be doubted that in the law, as well as in the [21] reputation of our fellow men, the most respected single piece of evidence of the marriage of a man and woman is their continued cohabitation, and the law, as well as society without the courts, presumes that cohabitation is meritorious rather than meretricious. If, however, the relations were meretricious in their inception, the presumption is that they continued as they were begun, and there must be further evidence to establish the marriage, for relations which are meretricious cannot ripen into connubial relations by mere lapse of time, but are characterized as immoral until a change of purpose is manifested. This change of purpose does not necessarily require direct proof, but may be found in circumstances.

In this case there is an abundance of testimony of cohabitation between Niulii and Kahaleahu. All the witnesses for the plaintiff and many of those for the defendant testify to it.

And this cohabitation was under a general repute of marriage. Again this is fully substantiated by the testimony both of the witnesses of the plaintiff and of the defendant. Among the witnesses for defendant testifying to the reputation of marriage may be cited Mrs. Fanny Norrie, Rebecca Pane, Duke Kahanamoku, Kamala, Puukou, Mrs. Kaahana Dias,

Kaweahu, Malulani, George Napahuelua.

But evidence of cohabitation and matrimonial repute are not sufficient either to prove the existence of a marriage or to raise the presumption thereof when the relations are shown in their inception to have been meretricious. (Reading F. I. Co. & T. Co. Appeal, 113 Pa., 204; Harbeck v. Harbeck, 102 N. Y. 714.) There must be a proof of a subsequent actual marriage. By this I do not mean that there must be testimony of actual eye witnesses [22] to the marriage. Such a rule would in many cases actually defeat justice, but I do mean that in case the inception of the relations was meretricious that it is necessary to prove something more than mere reputation that the parties were cohabiting as man and wife. There must be evidence, either direct or circumstantial, that there had been an actual marriage, either a ceremonial marriage (when this may be by law requisite to a valid marriage) or a contract of marriage *in praesenti,* where that is under the law sufficient to create a marriage between man and woman. In other words, there must be proof of a change in relations; some point where the meretricious relations ceased and the meritorious relations began.

The witnesses for plaintiff seem to agree that in its inception the relations between Niulii and Kahaleahu were not matrimonial, but were meretricious and that Niulii was pregnant before even the reputation of marriage arose. It follows that cohabitation and matrimonial repute and declaration would not, there-

fore, be sufficient to raise the presumption of marriage.

As I have before stated, there is no direct evidence of the marriage, no person in court on the stand who was present at the marriage, no record of the marriage produced. The evidence of marriage is purely that of declaration and family repute, and, as may well be the case, under the peculiar circumstances, confined to the immediate members of the family. In the condition of affairs in which Niulii apparently found herself it is not likely or probable that the marriage ceremony would be any more public than actually necessary. Of the immediate members of the family now living, namely Lydia and George, the latter was too young, being only one or two years old at the date of the birth of the plaintiff, to know the [23] circumstances of a marriage between Niulii and Kahaleahu. Lydia, however, was almost ten years old at the time. She testifies to having seen Niulii and Kahaleahu leave the house together; of their returning together with one Maunakalika (w), and that this Maunakalika there stated in the presence of the parents of Niulii and in the presence of Niulii and Kahaleahu and of the witness that the two were married,—the evident purport of the testimony being that they had been married since leaving the house together. This is the nearest to direct testimony of a marriage in the trial.

Furthermore, the Court may rightfully take into consideration all the surrounding circumstances in reaching a conclusion of marriage or otherwise, and in the case at bar many such circumstances are

valuable in arriving at a finding; the standing of the family, the temper of their great chief and their benefactor under whom they lived and of whose board they were fed, her well-known high ideals in the matter of marital relations, the fact that such an one in making her last will took particular pains to see that Niulii and her brother and sister were provided for. These and many other circumstances which do not rely for their probative value on the strength of human recollection, nor are disturbed by the weakness of human nature,—these, to me, throw the preponderance of weight of testimony on the side of the definite inception of a matrimonial relation. That there was a marriage between Niulii and Kahaleahu I am convinced from the testimony, and so find as a fact.

This leaves two questions of fact remaining, namely, was the marriage before the birth of plaintiff herein, and, second, if after the birth of plaintiff, was Kahaleahu her father?

The evidence on these two points is far from satisfactory. In considering it, however, a few facts must be borne in mind. [24] They are these:

Pauahi was known to be and shown by the testimony herein to be extremely opposed to sexual immorality in those about her; not less so was her husband, Mr. Charles R. Bishop.

Niulii was a kinswoman of Pauahi, a retainer about her house, and under the direct care and guidance of Pauahi. Niulii was a well known young woman. As one witness puts it, "She was a girl who could not be hid." She was of the blood of the aliis.

Niulii was a young girl; at the most she was seventeen or eighteen, probably only fifteen or sixteen.

Kahaleahu, on the other hand, was a commoner, parentage unknown, raised by a Chinaman in Waimea, Hawaii.

Kahaleahu was much older than Niulii. He had been once married and had been divorced nearly ten years before the birth of the plaintiff.

Kahaleahu at the time of the birth of the plaintiff had no steady or stated employment. He had been a cook, valet, and general house servant for Mr. Sam Parker.

Keeping these facts in mind, let us consider the opposing stories of this marriage and of the parentage of Niulii.

The account of the affair given by the witnesses for the plaintiff is to the effect that Pauahi, finding her charge Niulii to be pregnant, called Niulii before her and demanding to know who the father of the unborn child was, upon being informed it was Kahaleahu, directed that they be forthwith married.

The story of the only witness for the defendant as to the actual marriage, Becky Pane (which story she testifies she received from Lydia Kamae, an aunt of the plaintiff), is that when Pauahi found that Prince Leleiohoku was not the father [25] of the unborn child, but that the father was one Jim Williams, a negro coachman, she forced Niulii to marry Kahaleahu. This story is altogether too improbable, considering the other testimony, to be given credence. It is quite easy to believe that such a one as Pauahi, with the views she entertained in regard

to promiscuous cohabitation, should even in a matter where her own kinswoman was concerned, require the offending parties to marry, but it is quite unbelievable she would force one of her own blood and of the blood of the aliis to marry such an one as Kahaleahu because she had discovered that another man, even though that man were a colored coachman, was the father of the unborn child.

There was much evidence produced by the defendant to know that at the time of the pregancy of Niulii and the subsequent birth of the plaintiff Kahaleahu was living in Waimea, Hawaii, and could not, therefore, be the father of the plaintiff. While not passing lightly the weight of this testimony, its value must depend entirely upon a question of dates. In the matter of dates all testimony is unreliable, and the Hawaiian particularly so. In my opinion the case at bar is no exception in this respect.

As between the four putative fathers of plaintiff, Kahaleahu, Prince Leleiohoku, Willie Okai, and Jim Williams, the negro coachman, my own opinion is that the evidence strongly predominates in favor of Kahaleahu, and I find as a fact in this case that Kahaleahu was the father of the plaintiff.

Having already found that Kahaleahu and Niulii were married, it is unnecessary, therefore, to discuss the question of whether that marriage took place before or after the birth of the plaintiff. Our statute legitimatizing bastards upon the marriage of their parents first became law in 1866, long before the birth [26] of the plaintiff. My own opinion from the evidence is, however, that the marriage occured

a few days before the birth of the plaintiff.

I therefore find that the plaintiff herein is the legitimate child of Niulii and Kahaleahu.

This brings us to a discussion on law points involved. The case on the law was presented with a degree of care and learning never before enjoyed by this Court, the unhappy practice of leaving the trial court to shift for itself in matters of law not having in this case been followed.

The first group of law questions clusters about the construction of the will, the operative words of the devise before quoted. What estate did these create in Kahakuakoi and Kealohapauole? Did the surviving children take under the devise by purchase of descent? Are the words "heirs of the body" words of limitation or of purchase? What is the meaning of the words "of either of them"? Is the case changed by the use of the words "in default of issue?"

The plaintiff claims that the effect of the devise was to give to Kahakuakoi and Kealohapauole an estate for life, an estate in the entirety for life, with this limitation, that upon the decease of the survivor the heirs of either or both of the first takers should take an estate in fee simple, unless there had been a special default of issue; that is, unless at the time of the death of the survivor of Kahakuakoi and Kealohapauole there had been no children of them or either of them surviving.

The defendant claims that it was the expressed intention of the testatrix to create an estate in fee tail, with limitation over to the trustees in case of de-

fault of issue, and that there [27] being no estate in fee tail recognized by Hawaiian law, the legal effect of the devise was to create an estate in fee simple in Kahakuakoi and Kealohapauole.

Much time was spent in argument to the effect that the words "heirs of body" created at the common law an estate in fee tail. It appears to me unquestionable that at the common-law a devise to "A and the heirs of his body" would create a fee tail. Likewise it is clear that under the Hawaiian law an estate in fee tail cannot exist. (Rooker v. Queen's Hospital, 12H. 375, 391.)

Likewise it is clear that the rule in Shelly's Case that the words "heirs" or the words "Heirs of the body" are words only of limitation (that is, words used only to indicate the kind and quantum of the estate, to limit the line in which the property should descend in case the first taker did not dispose of it during his lifetime, and never of purchase is not the rule in Hawaii, and that the rule will not be followed to defeat the manifest intention of the testator. (Evans v. Bishop Trust Co., 21 H. 74.)

It is likewise agreed that fees simple conditional do not exist under Hawaiian law.

We are, therefore, led to the conclusion that if the testatrix has clearly manifested an intention as to the disposition of her property and that intention is legal and enforceable, such intention will be enforced by the courts of Hawaii, notwithstanding the artificial rules of construction of the common law. (Rooker v. Queen's Hospital, 12 H. 399.) Both sides, in fact, invoke this rule. The plaintiff

is certain that it was the intention of the testatrix to grant to Kahakuakoi and Kealohapauole a life estate only with remainder over to the children, [28] who would in such instance, of course, take by purchase. The defendant is equally certain that it was her intention to give to Kahakuakoi and Kealohapauole an estate of inheritance; in which case her children would take, if at all, by descent.

The intention of the testatrix must, of course, be manifested from within the four corners of the will, but the Court may and should, as nearly as possible, place himself in the position of the testatrix at the time the will was made, being careful, however, when the intention is plainly expressed in the words of the will, not to deduce from the surrounding circumstances an intention different therefrom. (Estate of Boardman, 5 H. 146, 149.) In the case at bar the Court may and should take into consideration not only the will as a whole and the specific devise under consideration, but also the circumstances in evidence surrounding Pauahi at the time the will was executed, the relations between her and the devisees, between her and the children of the first takers, the dependence of the family upon her bounty at the time the will was made for their home and their subsistence, and any other fact in evidence which will tend to place the Court in the same position the testatrix was in when the devise was made for the purpose of ascertaining her intention in the use of the words of the devise.

Is there any such clearly manifested intention in the devise in question? If there is such intention

manifested, is it enforceable under the laws of the Territory?

It is admitted by both sides that the will is drawn with extreme care and that the testatrix used words in their nicest and most exact meanings. There is no excuse, therefore, to go outside the plain meaning of the words used. [29]

Taking, then, the words of the devise and using the simplest and most common meaning of those words, what do we find?

(1) We find that the devise is to a man and his wife. Under the Hawaiian law this, before the passage of the Married Woman's Act, created an estate in the entirety with the incident right of survivorship. The testatrix must be presumed to have known this and to have known that upon the death of the survivor of the couple, unless the estate could have been and had been conveyed away by the joint act of the first takers, only the heirs of the survivor would take by descent.

(2) By this was evidently not the intention of the testatrix. She desired that the heirs of either should take the inheritance. She therefore provided that the devise should be to the man and his wife and to the heirs of either (meaning, it seems clear to me, the heirs of either and/or, of both.)

(3) But the testatrix did not want the heirs generally of either or both to take. She desired that the descent should be only to the heirs of the body, and she therefore provided that the bequest was to them "and to the heirs of the body of either."

(4) But it is very evident that the testatrix did

not want the heirs generally of the first takers to take in any event, for she provided that "upon default of issue of the same to go to my Trustees." Whether this means a general default of heirs, that is a default at any point in the line of descent is not free from doubt. It is not in issue here, save as aiding in the determination of the testatrix, as there has been neither general nor special default of issue.

Keeping in mind, then, these, that seem to me, manifest intentions of the testatrix in the making of this devise, I am [30] led to the conclusion that one of two things was intended by the testatrix, namely, that either,—

(1) The old folks, Kahakuakoi and Kealohapauole, should take an estate of inheritance by the entirety, which, if not conveyed by the joint act of the couple during life, should descend to the children of the couple, and/or, the children of either of the couple, in case either had children by another, in direct and lineal descent forever; and, in case of a default in such lineal descendants, then to the trustees, or,—

(2) The old folks should take an estate only for life with remainder over to their children or to the children of either by some other in fee simple, and, in case none of such children survived that survivor of the original takers, then to the trustees.

Did she intend to give to Kahakuakoi and Kealohapauole a life estate only? If there is one thing above all others that is shown by this will and codicils it is that the testatrix knew how, when she so desired, to grant a life estate. There are no less than

fifteen estates for life created by this will. In all but one of these gifts identical words are used, namely, "during the term of his (or her or their) natural life." In the one exception the words used are, "to hold for his life, remainder * * * "

It is equally plain that the testatrix knew how to devise lands by proper words to reach the result claimed by the plaintiff herein to have been her intention in the case at bar. Article VI of the first codicil was a gift to a man and his wife, (thereby creating an estate in entirety) for life with remainder over. There the testatrix used the words, "to have and to hold for and during the term of their natural [31] lives and that of the survivor of them; remainder to * * * "

I am irresistibly led to the conclusion that the testatrix meant to give to Kahakuakoi and Kealalohapauole something more than a life estate. She meant to give them an estate of inheritance. I am of the opinion that she intended to create an estate in fee tail. In that she was thwarted by the law of Hawaii, which has declared that no such estate exists in Hawaii. The nearest we can approach, therefore, the intention of the testatrix (having decided that she did not intend to create a life estate in Kahakuakoi and Kealohapauole) is to declare the estate which she did create a fee simple estate.

I am not, by so declaring, intending to hold that the testatrix intended to create in Kahakuakoi and Kealohapauole a fee simple estate. It is plain that the testatrix knew well how to create such an estate. I am holding merely that the words she used must be

interpreted to create such an estate; that her apparent intention is not enforceable under the law of Hawaii; that the nearest we may arrive at that intention is to declare that the devise did create a fee simple.

Much stress is laid by the counsel for plaintiff in the rule found in more than one text book that where there are superadded words in a devise which change the course of an inheritance that such words act to change the devise from a devise of inheritance whereby the heirs take, if at all, by descent, to a devise where the heirs take by purchase. This rule appears to me to be not so much a rule of construction as an aid in determining the intention of the testator. As such, it is often of great value, for, if the testator deliberately changes the course of the descent by adding words to the devise indicating his wish contrary to the statute of descent, it would, [32] of course, be evidenced that he intended some added right to thereby attach to the second takers. This could only be done by the second takers taking by some other right than the right of descent, or, in others words, by the second takers taking by purchase. Counsel for plaintiff argues that this devise to kahakuakoi and Kealalohapauole, being a devise of an estate by the entirety, in which only the heirs of the survivor would take by descent, the provisions for the taking by the heirs of either or both, and the provisions that in the default of heirs the estate should go to the trustees are superadded words, changing the course of descent and thereby indicating an intention to give the second takers an estate

by purchase. In this I agree with counsel, and, were it not for the considerations stated, these words changing the course of descent would be well-nigh controlling in my determination of the intention of the testatrix. They are to my mind, however, merely a part of the evidence, items in the proof of the intentions of the testatrix, and do not control.

If, therefore, a fee simple was created, the mortgage, the sale thereunder, the purchase by Charles R. Bishop, and the mesne conveyances through the defendant, all are legal, and the decision and judgment must be for the defendant.

Let judgment enter accordingly.

Honolulu, T. H., February 14, 1917.

[Seal] (S.) WM. L. WHITNEY,
Second Judge. **[33]**

[Endorsed]: L. 8487. 6/51. Circuit Court, First Circuit, Territory of Hawaii. Helen K. Kinney, Plff., v. Oahu Sugar Co., Deft. Decision. Filed Feb. 14, 9:57 A. M. 1917. (Sgn.) B. N. Kahalepuna, Clerk. **[34]**

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

JANUARY TERM, 1916.

EJECTMENT.

HELEN K. KINNEY,
Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,
Defendant.

Judgment.

This action by petition claiming an undivided one-third of that certain piece or parcel of land situated at Hanohano, Ewa District, City and County of Honolulu, Territory of Hawaii, and being a part of those premises described in Land Commisison Award No. 5930 to Puhalahua and more particularly described as follows, to wit:

Beginning at a marked rock near the Waikele River, at the mauka corner of Ulumalu; the boundary runs by the magnetic meridian as follows:

N	2°	00′	E	594	feet	along	Aulii	Grant	712
N	60°	00′	W	1346	"	"	"	"	"
N	68°	00′	W	264	"	"	"	"	"
N	24°	00′	W	726	"	"	"	"	"
N	4°	00′	W	792	"	"	"	"	"
N	24°	00′	W	396	"	"	"	"	"
N	34°	30′	E	924	"	"	"	"	"
N	8°	30′	W	1399	"	"	"	"	"
N	25°	00′	E	670	"	"	"	"	"
N	30°	00′	W	1023	"	"	"	"	"
N	39°	00′	W	264	"	"	"	"	"

along Pali to the rock called "Uhakai" at the junction of the Kipapa and Keaakukui gulches; [35]

N. 7° 00′ W 300 feet more or less, down the pali to a point in the gulch or the boundary of Pouhala;

S. 19° 00′ W 950 feet more or less across the stream and up the pali to a point on the west bank of the Keaakukui gulch, on the boundary of Pouhala;

S 12° 30′ W 914 feet along R. P. 4486 along Pali;

S 13° 30′ E 755 feet along the same;

S 14° 30′ W 1463 feet along the same;
S 23° 00′ E 1036 feet along the same;
17° 30′ E 235 feet along the same to a marked rock on the edge of the Pali Pohakupili;
N 79°00′ E 231 feet down to marked rock at the foot of the pali at the bend of the river along Waipahu Gr. 122, thence along the river which separates this land from Waipahu to the initial point;

Area 145 4/10 acres;

and claiming also ~~Fifty~~ ~~Thousand~~ ~~Dollars~~ ~~($50,000)~~ damages being at issue came on to be heard before this Court at the January, 1916, Term thereof, a trial by jury having been duly waived, and the parties thereto and their respective attorneys appearing and having been heard, and witnesses examined and arguments made in their behalf, and the said case having been submitted, and this Court having rendered and filed its decision therein on the 14th day of February, 1917, wherein and whereby said Court found and finds in favor of the defendant and against the plaintiff,

NOW, THEREFORE, it is: ADJUDGED that the plaintiff recover nothing by her said action and that the defendant recover of the plaintiff its costs taxed at the sum of Eighty-seven and 90/100 Dollars. W. L. W.

By the Court.

[Seal] (Sgd.) A. K. AONA,
Clerk.

Entered this 17th day of February, 1917, as of ~~the~~ W. L. W. February 14, 1917.

~~January Term, 1916.~~

Let judgment issue.

(S.) WM. L. WHITNEY,
Judge. **[36]**

[Endorsed]: R. 6/51. L. No. 8487. Reg. 5, pg. 453. Circuit Court, First Circuit, Territory of Hawaii. January Term, 1916. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Limited, Defendant. Judgment. ———, Judge. Filed Feby. 17, 1917, at 12 M. (S.) Henry Smith, Clerk.

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In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

IN ERROR TO THE CIRCUIT COURT OF THE FIRST CIRCUIT TERRITORY OF HAWAII.

HELEN K. KINNEY,
Plaintiff and Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,
Defendant and Defendant in Error.

Joinder in Error.

Now comes the defendant and defendant in error and says that there is no error in the judgment entered in the above-entitled cause by the said Circuit Court of the First Circuit of the Territory of Hawaii, and prays that this Honorable Court may proceed to examine the said judgment and the record

and proceedings in the said cause and the matters assigned for error therein and that the said judgment may be affirmed.

Honolulu, T. H., March 7, 1917.

OAHU SUGAR COMPANY, LIMITED,
By Its Attorneys,
(S.) THOMPSON, MILVERTON & CATHCART,
FREAR, PROSSER, ANDERSON & MARX.

Due service of a copy of the within Joinder in Error this day admitted.

Dated March 7, 1917.

CASTLE & WITHINGTON,
W. C. ACHI,
Attorneys for Plff. & Plff. in Error.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney vs. Oahu Sugar Company, Ltd. Joinder in Error. Filed March 7, 1917, at 10:45 A. M. J. A. Thompson, Clerk. Thompson, Milverton & Cathcart, Frear, Prosser, Anderson & Marx, 303 Stangenwald Building, Honolulu, Attorneys for Defendant. [37]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

No. 1005.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

Hon. W. L. WHITNEY, Judge.

HELEN K. KINNEY

vs.

OAHU SUGAR COMPANY, LIMITED.

Opinion.

Argued May 14, 15, 1917. Decided May 28, 1917.

ROBERTSON, C. J., QUARLES AND COKE, JJ.

Wills—construction—technical words.

The technical meaning of words used in a will may be subordinated to the real intent of the testator, but the presumption is that technical words were used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary.

Words and Phrases—"heirs of the body."

The phrase "heirs of the body" is the ordinary, proper and technically accurate one to use in the creation of an estate in fee tail.

Same—"limited."

The word "limited," when used with reference to the creation of an estate in real property, means "defined."

Estates—estate in fee tail—construction.

A testatrix devised land to K and K, her husband, "unto them and to the heirs of the body of either" and "upon default of issue" to trustees appointed by the will. Held, that the testatrix intended to devise to K and K an estate in fee tail, and that, as estates tail cannot exist in Hawaii, the devise took effect as an estate in fee simple in K and K, it not appearing that a life estate in K and K with remainder to the heirs of the body of either would more nearly carry out the intention of the testatrix. [38]

OPINION OF THE COURT BY ROBERTSON, C. J.

This is a writ of error to review the judgment of the Circuit Court of the first circuit in an action of ejectment to recover a tract of land situate at Hanohano, district of Ewa, city and county of Honolulu. The case was tried, jury waived, and judgment was rendered in favor of the defendant.

The plaintiff claimed title to an undivided one-third of the land as one of the heirs of the bodies of Kahakuakoi and Kealohapauole, devisees under the will of the late Bernice Pauahi Bishop, and as heir of a deceased brother. There was evidence that Kahakuakoi and Kealohapauole had three children, Niulii, George and Lydia; that Niulii died in 1890, leaving two children, Helen (the plaintiff) and John Paalua; that Kahakuakoi and Kealohapauole died respectively in 1910 and 1914; and that John Paalua died in 1915. It further appeared that the land was mortgaged on December 15, 1890, by Kahakuakoi and Kealohapauole to Bishop & Company, bankers, and was sold under foreclosure of the mortgage on January 28, 1893. Through mesne conveyances the defendant claims title under the foreclosure deed, and also by adverse possession. On October 22, 1894, Kahakuakoi, Kealohapauole and George and Lydia Kealohapauole executed a deed of all their right, title and interest in the land to the defendant's grantor for a nominal consideration. In the trial court the two principal questions were, one of fact, whether the plaintiff had proven her alleged heirship, which, upon conflicting testimony, was de-

cided in her favor, and one of law, whether she took any estate in the land under the provisions of the will, which was decided against her. This court has only to deal with the question of law. The case has been thoroughly and elaborately briefed and ably argued, but much of the discussion has been of an academic nature and seems not to require attention in all its many phases. [39]

The testatrix died October 16, 1884. In the fifth paragraph of her will she said: "I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of Thirty Dollars ($30) per month, (not $30 each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed." The clause was modified in the eleventh paragraph of the first codicil to the will, as follows: "I revoke so much of my said will as devises the land known as 'Mauna Kamala' to Kahakuakoi (w) and Kealohapauole, her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."

On behalf of the plaintiff in error (also plaintiff below) it is contended (1) that at common law the devise would not create a fee tail general or a fee tail at all in Kahakuakoi and Kealohapauole, but

contingent remainders in the heirs of the body of either vesting at death, and in default of heirs of the body of either, then to the trustees; (2) that in Hawaii, even if the devise created a fee tail at common law, this is to be construed as a fee simple, or an estate for life with remainder over, according as such construction will carry out more nearly the intent of the testator drawn from the will and the surrounding circumstances; (3) that the cases of Nahaolelua v. Heen, 20 Haw. 372, and Boeynaeme v. Ah Leong, 21 Haw. 699, settle the law in Hawaii, that even if a devise or a deed creates at common law a fee tail, if it appears that the testator or the grantor had in mind some benefit for the heirs of the body, the devise or grant will be construed [40] as a life estate in the first taker and remainder over; (4) that the use of the words "of either" and the devise over in default of issue, meaning heirs of the body of either, show that, in the mind of the testatrix, the heirs of the body of either were to take an interest, as they cannot take by descent, they must take by purchase, which would require, under the decision in the Nahaolelua case, a holding that the estate created by this will is a life estate by the entirety with remainder over to the heirs of the body of either; (5) that it will be presumed that the testatrix intended to create a legal estate, rather than an illegal one—a devise for the life of the first takers, rather than a fee tail which cannot exist in this Territory; and (6) that the construction contended for is re-enforced by the use of the word "limited" in the codicil, especially if the devise to

the first takers creates a fee simple, for then the devise over is a conditional estate dependent on the defeasance of the fee simple already given.

On behalf of the defendant in error it is contended (1), that the words "heirs of the body of either" are words of inheritance and not of purchase, and the estate would be a fee tail at common law, and also in Hawaii, if fees tail could exist here; (2) that where, as in this Territory, fees tail do not exist, a fee tail, in the absence of controlling words to the contrary, would be a fee simple; (3) that it was the intention of the testatrix to create an estate of inheritance, and not a life estate and remainders; (4) that the word "either," the gift over "upon default of issue," the will and codicils taken as a whole, the legal presumptions, all tend to support that view; and (5) that the intention of the testatrix can better be met by holding that Kahakuakoi and Kealohapauole took title in fee simple, than that they took for life only. The claim of title by adverse possession, and the contention that the defendant **[41]** has at least the right of possession for a term of years under a lease made by Kahakuakoi and Kealohapauole for fifty years from January 1, 1892, under the view we take of the case, need not be considered.

The will and codicils were drawn with much care and accuracy of expression. It appears from the record in the proceeding for the probate of the will which is in evidence in this case that they were drafted by Francis M. Hatch, at one time a justice of this court, but the language used must, of course,

be regarded as that of the testatrix herself. It is obvious that the testatrix knew how to express an intention to create a life estate and remainder, as well as to devise in fee simple. Thus, in the fourth paragraph of the will, there was a devise of land to L, "to have and to hold for and during the term of her natural life; and after her decease to my trustees upon the trusts below expressed." There were a number of such life estates given by the will and codicils. In the ninth paragraph of the first codicil there was a devise of land and a fishery to D, "to have and to hold with the appurtenances to him, his heirs and assigns forever." In the fifth paragraph of the first codicil there was a devise of land to K and H, his wife, "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees upon the trusts named in my said will." It would seem, then, that in devising the land in dispute to Kahakuakoi and her husband "unto them and to the heirs of the body of either," and "upon default of issue" to the trustees, the testatrix intended to create an estate other than a fee simple, or a life estate or estates and remainders. What was it? No authority exactly in point has been found.

The word "heirs," though it may be and sometimes is used as a word of purchase, is primarily, ordinarily, and in a strict technical sense, a word of limitation denoting an estate [42] in fee simple. 40 Cyc. 1574; 2 Jarman on Wills (6th ed.), 69; Thurston v. Allen, 8 Haw. 392, 402; Ninia v. Wilder, 12 Haw. 104, 108; Iuko v. Holt, 9 Haw. 88, 91. And, at common law, after the enactment of the statute

de donis conditionalibus in 1285, the phrase "heirs of the body" was the ordinary, proper and technically accurate one to use in the creation of an estate in fee tail. 2 Jarman, *supra;* Rooke v. Queen's Hospital, 12 Haw. 375, 390; Nahaolelua v. Heen, *supra,* at p. 376. In Pearsol v. Maxwell, 68 Fed. 513, where there was involved a devise to one and "the heirs of her body," and a contention was advanced for a life estate and remainder, the Court said: "These are the aptest words for the creation of an estate tail. Standing alone, they would admit of no other interpretation." And that they "are strictly and technically words of limitation." And in the same case on appeal the Court said, "that these words, if alone considered, created an estate tail, is hornbook law." 76 Fed. 428. The technical meaning of words used in a will may be subordinated to the real intent of the testator, but the presumption is that technical words were used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary. 40 Cyc. 1398; Land Co. v. Barker, 60 So. (Ala.) 157; Morse v. Ballou, 90 Atl. (Me.) 1091; King v. Johnson, 83 S. E. (Va.) 1070; Lane v. Dillon, 85 S. E. (S. C.) 369; Black v. Jones, 264 Ill. 548, 555. "It is a well-settled rule of construction, that technical words of limitation used in a devise, such as heirs generally, or heirs of the body, shall be allowed their legal effect, unless from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise. Or, to use the langauge of Lord Eldon, in Wright v. Jesson, 2 Bligh, 1, the words heirs of the body will indeed yield to a par-

ticular intent that the estate shall be only for life, and [43] that may be from the effect of superadded words, or any expression showing the particular intent of the testator, but that must be clearly intelligible and unequivocal." Clark v. Smith, 49 Md. 106, 117. We must hold, therefore, that the intention of the testatrix was to create in the devisees an estate of inheritance—an estate in fee tail—unless we find words in the will which clearly show that the testatrix meant something else.

It is contended that the use of the words "of either," the devise over upon default of issue, the word "limited" in the phrase in the codicil, "to have and to hold as limited in said fifth article of my said will," and the fact that the annuity given by the fifth paragraph of the will was for the life of the annuitants and the survivor of them merely, tend to show an intent on the part of the testatrix that the devise of the land was to be for life only in the first takers. It is argued that the words "of either" in the phrase "and to the heirs of the body of either," would prevent Kahakuakoi and Kealohapauole from taking more than a life estate because each of them might have left heirs, not of their joint bodies, who could not take by descent from the other spouse and, hence, could take only as purchasers. And so it is urged that, in order to carry out the apparent intention, the estate in the first takers must be held to be an estate by the entirety for life, and those of the heirs of the body of either remainders. The first takers, being husband and wife, presumably took by the entirety: Robinson v. Aheong, 13 Haw. 196. The statute (R. L. 1915, sec. 3132), providing that all grants

and devises of land to two or more persons shall, unless it manifestly appears to have been otherwise intended, be construed to create estates in common, does not apply here since it was enacted after the will took effect. But we think the conclusion reached by counsel is not sound. [44] The word "either" does not refer to the first takers or necessarily affect the estate devised to them. It relates only to the inheritance. There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances. 2 Jarman on Wills (6th ed.), 267; Ex parte Tanner, 20 Beav. 374, 52 Eng. Rep. 647; Doe v. Green, 4 M. & W. 229, 150 Eng. Rep. 1414. And we see no reason why the principle should not apply in the case of an estate by the entirety in tail. It is really of no practical importance in this case whether the first takers be regarded as having been tenants by the entirety, joint tenants or tenants in common, and as this case does not involve a controversy between two different sets of heirs of the first takers it is a matter of academic interest only as to how the heirs of one spouse who were not also heirs of the other, had there been such, would have taken. We think, however, that the contention of counsel for the defendant in error that without the words "or either" the descent would have been limited to the heirs of the joint bodies of the first takers, thus creating an estate tail special, and that that word was used to express the intention to create an estate tail general in sound. Under this theory the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during

the life of the surviving spouse. It is to be noted, in this connection, that in the clause in question no words of separation or futurity were used to draw a line of demarcation between the estate of the first takers and that of the heirs. The devise over to the trustees upon default of issue does not militate against the theory of any estate of inheritance. It is not only feasible to limit a remainder after an estate tail upon failure of issue, but, in order to complete the testamentary disposition, is the natural thing for a testator to do. We think the use of the word "limited," in the codicil, does not support the claim [45] of the plaintiff in error. As said in Anderson's Law Dictionary, " 'To limit' an estate is to define the period of its duration. The words employed are thence termed 'words of limitation,' and the act itself 'limiting' the estate." Bouvier says the limitation of an estate is "The definition or circumscription, in any conveyance, of the interest which the grantee is intended to take." 2 Bouv. L. Dict. (3d ed.), 2021. The word "limited" is often used in the sense of "defined," and was so used in the clause referred to. By the provision in the codicil the testatrix meant, and clearly said, that she gave to Kahakuakoi and Kealohapauole, in lieu of the devise contained in the fifth article of the will, the same estate in the land known as Hanohano, as by said article, she had given to them in the land called Mauna Kamala. Nor do we think the fact that the annuity was given to the same devisees for their lives and that of the survivor throws any light on the intention of the testatrix with reference to the devise of the real estate. If, instead of the gift of the annuity,

there had been a devise to the same parties of an express life estate in another piece of land, it could not have been held that it pointed to an intention to create a similar estate in the land of Hanohano. On the contrary, the difference in phraseology would have indicated an intent to create different kinds of estates. We conclude, therefore, that there is no language in the will which shows that the testatrix used the words "heirs of the body" in any other than their usual and technical sense. On the other hand, there is affirmative evidence tending to show that the testatrix did not mean that Kahakuakoi and Kealohapauole were to have an estate for life only. In every instance where the will expressly created an estate for life the remainder was devised to the trustees, and there was a provision in the first codicil that "I hereby give the power [46] to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent, however, after such decease to be paid to my executors or trustees." That provision tends to show that the testatrix did not intend to give an estate in remainder to the heirs of the bodies of Kahakuakoi and Kealohapauole, and is strongly indicative of an understanding on her part that in every case where a life estate had been devised the remainder over was given to the trustees.

The rule is invoked that in case of doubt a testator will be presumed to have intended a legal estate

rather than an illegal one. And it is urged that as fees tail cannot exist in this jurisdiction it should be presumed that Mrs. Bishop did not intend to create an estate in fee tail by the devise in question. The presumption does not operate with much force in the case at bar since an impression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here, and there was no reported ruling to the contrary till the case of Rooks v. Queen's Hospital was decided in 1900. In a jurisdiction where fees tail have been abolished the courts would be slow to construe a will executed after the abolition as intending to create such an estate. Such an intention would not be implied. But where the language used in a will shows unmistakably that such was the intention or attempt of the testator the courts cannot do otherwise than recognize the fact and give such effect to it as they may under the law. As to the will in hand we have no doubt as to what the testatrix intended. [47]

It is definitely settled that an estate tail cannot exist or be created in this Territory. Rooke v. Queen's Hospital, *supra;* Nahaolelua v. Heen, *supra;* Boeynaems v. Ah Leong, *supra.* In the absence of statute, what is the proper course for the Court to pursue in a case like this? The ruling in Nahaolelua v. Heen was to the effect that the attempt to create a fee tail may be given the effect of creating either an estate in fee simple in the first taker, or a life estate in the first taker and a remainder in fee simple in the issue according to whether the one effect or the other will go more nearly towards carrying out the intention of the grantor or testator in each case. The

other alternative would be to hold the entire grant or devise to be void. But that course has not been adopted here or elsewhere. Here, the plaintiff in error contends for a life estate and remainder on the ground that the will shows an intention on the part of the testatrix to benefit the heirs of the body of the first takers, and, further, because the testimony in the case shows that the plaintiff's grandmother was a cousin of the testatrix, and that the testatrix showed a personal interest in the plaintiff's mother and a practical interest in the welfare of the plaintiff herself. There is nothing in the will, however, beyond the mere limitation to the heirs of the body to indicate that the testatrix intended any benefit to the heirs of the first takers, and, as a futile attempt to create an estate in fee tail is not to be held in every case to create a life estate and remainder, it does not afford a sufficient reason for so holding in the present case. The case of Nahaolelua v. Heen, involved the construction of a deed. It there appeared that on August 10, 1871, one Elizabeth K. St. John, the mother of the plaintiffs, in contemplation of marriage, conveyed certain land to trustees to hold upon trust for the use of the trustor until her marriage to one Huakini; to pay the net income to her, after marriage, [48] during her coverture with Huakini; to, in case of her death after marriage and during the lifetime of her husband, leaving issue of the marriage, apply the net income to the maintenance of such issue during minority; and, upon such issue obtaining majority, to convey the land to them. On September 13, 1873, the trustees executed the deed

which required construction. It recited the execution of the prior deed, the marriage of the parties, and the birth of a son; and stated the consideration to be the marriage, the birth of the child, the special request of the grantee, and the payment of one dollar. It conveyed the land to the said Elizabeth Huakini, "and the heirs of her body forever." The deed contained a provision which it was held should be disregarded as being repugnant to the grant, but which, since it was held that the deed attempted to create an estate tail, and that estates tail do not exist in this Territory, could properly be taken into consideration in connection with the question as to how best to approximate the intention of the party, as follows: "In special trust for the use and benefit of her son Edward Nahonoomaui Kia, and such other child or children as may hereafter be born to her, and his or their heirs and assigns forever as he or they shall arrive at the age of legal majority." After referring to the rule that the intention of the parties to a deed is to be ascertained and given effect to if practicable, the Court said: "Applying this rule it is apparent that the intent of the parties to the deed of September 13, 1873, will be most nearly carried out by holding that Elizabeth should take a life estate, with remainder in fee simple to the plaintiffs, 'the heirs of her body.' This view gives effect as nearly as possible to those formal parts of the deed usually regarded as being sufficient, under the law, to pass title." The decision was followed in Boeynaems v. Ah Leong, *supra,* where the same deed was involved, without further discussion, and that case, in turn,

was affirmed by the Supreme Court of the United States, [49] without opinion. The facts in the Nahaolelua case were unique, and we think the case was rightly decided; but, except that they included an attempt to create an estate in fee tail, they bear no resemblance to the facts in the case at bar. We reaffirm the ruling made in that case that, in this jurisdiction, when a futile attempt has been made to create an estate in fee tail it will take effect either as a fee simple or a life estate and remainder according to which appears to more nearly effect the intention of the grantor or testator, and hold, further, that ordinarily it will be held to take effect as a fee simple unless something appears which should send it the other way. Whether the Court could go beyond the language of the will and consider the extrinsic testimony as to surrounding circumstances need not be decided as, in our opinion, the testimony referred to in this connection throws no light on the subject. What the testatrix might have done had she been advised that she could not create an estate tail is left to conjecture. There is nothing tending to show a preference for a life estate and remainder.

In a jurisdiction where fees simple conditional, but not fees tail, are recognized an unsuccessful attempt to create an estate in fee tail might take effect as a fee simple conditional. See Archer v. Ellison, 5 S. E. (S. C.) 713; Pierson v. Lane, 60 Ia. 60. But it was pointed out in Rooke v. Queen's Hospital, *supra,* at p. 394, that, for the same reasons that estates tail have no place under the laws of Hawaii, fees simple conditional cannot exist here. In Jewell v. Warner, 35 N. H. 176, the court, after showing

that the statutes of New Hampshire relating to wills and the descent of property were irreconcilable with the statute *de donis* and repugnant to the nature of estates tail, said (p. 185), "The restrictive words added to 'heirs' 'of the body,' or 'male or female of the body,' or 'by the body of any particular wife or husband,' are simply inoperative. [50] They create neither an estate tail nor a fee simple conditional, but an estate in fee simple, as if they had been entirely omitted." See, also, Merrill v. Baptist Union, 73 N. H. 414. In Calder v. Davidson, 59 S. W. (Tex.) 300, 302, where the Court had before it a deed conveying land to "Mary Walker Calder, and the heirs of her body by the said R. J. Calder," it was said, "At the common law the language would have created a fee tail special, and, since estates tail are forbidden in this state, the deed must be held to have vested a fee simple title in the first taker." And see Rowland v. Warren, 10 Or. 129. In a jurisdiction where estates tail in real property cannot exist the situation, where there has been an attempt to create such an estate, is somewhat analogous to that where there has been an attempt to create an estate tail in personal property, and, in that case, it is held that the party will take an absolute interest in the property. 10 R. C. L. 657; Elton v. Eason, 19 Ves. Jr. 73; Smith's Appeal, 23 Pa. St. 9. We take the view that where it does not appear that in the particular case a life estate and remainder would more nearly comply with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind the attempted

fee tail should take effect as a fee simple in the first taker. This, because both are estates of inheritance, and belong to the same genus; both, at common law, were subject to the incidents of dower and curtesy, and were without impeachment of waste; the tenant in tail could bar the entail; an estate tail, in point of law, bears little resemblance to a life estate and remainder; and the law generally favors the first taker. In short, in such a case as this, a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail. [51]

We hold that Kahakuakoi and Kealohapauole took under the will and codicil an estate in fee simple in the land in dispute, and that the plaintiff has no interest therein.

The judgment of the Circuit Court is affirmed.

D. L. WITHINGTON (CASTLE & WITHINGTON and W. C. ACHI, on the Brief), for Plaintiff in Error.

W. F. FREAR and J. W. CATHCART (FREAR, PROSSER, ANDERSON & MARX and THOMPSON, MILVERTON & CATHCART, on the Brief), for Defendant in Error.

A. G. M. ROBERTSON,
RALPH P. QUARLES,
JAMES L. COKE.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. October Term, 1916. Helen K. Kinney v. Oahu Sugar Company, Limited. Opinion. Filed May 28, 1917, at 11:37 A. M. J. A. Thompson, Clerk. [52]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

No. 1005.

IN ERROR TO THE CIRCUIT COURT OF THE FIRST CIRCUIT.

HELEN K. KINNEY

vs.

OAHU SUGAR COMPANY, LIMITED.

Judgment.

This cause having come on to be heard, and having been argued by counsel for the respective parties, and the Court having considered the same, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii in this cause be and the same is hereby affirmed.

Entered this 28th day of June, A. D. 1917.

By the COURT.

[Seal] (Sig.) J. A. THOMPSON,
Clerk.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney vs. Oahu Sugar Company, Ltd. Judgment. Filed June 28, 1917, at 2:15 P. M. J. A. Thompson, Clerk. [53]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

Petition for Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii.

To the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii:

Helen K. Kinney, petitioner in the above-entitled cause, feeling herself aggrieved by the decision and judgment in said cause affirming the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii was entered on the 28th day of June, A. D. 1917, and complaining says: That there is manifest error, to the damage of the petitioner in the same, which errors are specifically set forth in the assignment of errors filed herewith, to which reference is hereby made; that the amount involved in said suit, exclusive of costs, exceeds the sum or value of Five Thousand Dollars ($5,000), and that it is a proper case to be reviewed by said Circuit Court of Appeals; and therefore your petitioner would respectfully pray that a writ of error be allowed to her in the above-entitled cause and

that she be allowed to prosecute the same to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws [54] of the United States in that behalf made and provided; that an order be made fixing the amount of security which the petitioner shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, procedings and papers in this cause, duly authenticated, for the correction of the errors so complained of and that a citation and supersedeas may issue.

And your petitioner will ever pray.

Dated Honolulu, T. H., July 28, 1917.

(Signed.) HELEN K. KINNEY,
Petitioner.

Subscribed and sworn to before me this 27th day of July, 1917.

[Seal] (Signed) W. A. GREENWELL,
Notary Public, First Judicial Circuit, Territory of Hawaii.

CASTLE & WITHINGTON,
Attorneys for Petitioner.

The foregoing petition is granted, the writ of error allowed, and the amount of bond on said writ of

error is fixed at 300 Hundred Dollars.

[Seal] (Sig.) A. G. M. ROBERTSON,
Chief Justice.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk. [55]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,
Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,
Defendant.

Assignment of Errors.

Now comes the above-named plaintiff, Helen K. Kinney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the Court erred in ordering and rendering judgment that the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii in said cause be affirmed, and not reversing said judgment and ordering that judgment be entered in favor of the plaintiff, as prayed for, for the premises involved in said action, and that the amount of her mesne profits be ascertained and a judgment be entered therefor against the defendant.

II.

That the said Court erred in entering judgment

for the defendant and against the plaintiff.

III.

That the said Court erred in holding that the testatrix in [56] making the devise in question unto Kahakuakoi and her husband "unto them and to the heirs of the body of either" and "upon default of issue the same to go to my trustees" did not intend to create a life estate or estates in the said Kahakuakoi and her husband and remainders over.

IV.

That the said Court erred in holding that the word "either" does not refer to the first takers or necessarily affect the estate devised to them.

V.

That the said Court erred in holding that there is no reason why an estate by the entirety in tail with several inheritances cannot be created.

VI.

That the said Court erred in holding that it is of no practical importance in this case whether the first takers be regarded as being tenants by the entirety, joint tenants or tenants in common, and in holding that it is a matter of academic interest only how the heirs of one spouse who were not also the heirs of the other would have taken.

VII.

That the Court erred in holding that the will is to be construed with reference simply to conditions as to issue which have eventuated and not to conditions which might eventuate under the will as made by the testatrix.

VIII.

That the said Court erred in holding that the words "of either" express the intention to create an estate tail general, [57] and that the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse.

IX.

That the said Court erred in holding that the devise over to the trustees upon default of issue does not militate against the theory of an estate of inheritance, in that the Court entirely overlooked the fact that the devise over is in default of issue of either, and that if either left issue that issue would take the entire property, and as the separate issue of one could not inherit from the other as heirs of the body of that other, that separate issue of the one must take by remainder and not by inheritance.

X.

That the Court erred in failing to give effect to the words of the testatrix, viz., "heirs of the body of either" and the devise over to the trustees "in default of issue," evidently meaning issue of either, which conclusively show that the testatrix intended title to the property to be transmitted, after life estates by the entirety in the first takers, to persons who could not take by descent, and further erred in holding that this intention of the testatrix (found by the Court) that the separate heirs of the body of each, as well as the joint heirs of both, are to take, can be effectuated by an estate by the entirety for life in the first takers and several inheritances, since

the intention of the testatrix is clear that the devise over to the trustees shall not take effect so long as there are heirs of the body of either, separate or joint, and as the separate heirs of the body of one cannot take by descent the separate inheritance of the other, to effectuate this intent of the testatrix [58] the estate must be an estate by the entirety for the lives of the first takers and remainders over to the heirs of the body, whether separate or joint, of the first takers.

XI.

That the Court erred in refusing to hold that the natural and plain meaning of the language employed by the testatrix is that an estate by the entirety having been created, at the decease of the survivor the entire estate would pass to the heirs of the body of either in case either left heirs of the body, whether heirs of the body of the survivor or not, an intent clearly incompatible with an intent to create an estate tail.

XII.

That the Court erred in holding that the word "limited" in the codicil and the fact that the annuity was granted for life have no bearing on the construction of the devise in question.

XIII.

That the Court erred in holding that the provision giving power to certain beneficiaries in the will to make leases for the term of ten years has any bearing on the clause in question.

XIV.

That the Court erred in holding that the rule

that in case of doubt a testator will be presumed to have intended a legal estate rather than an illegal one has no bearing on the question, and in holding, without evidence, that "an impression seems formerly to have existed—how prevalent it was we do not know—that the fees tail exist here," and in holding that there is in this case an unmistakable intent to create a fee tail. [59]

XV.

That the Court erred, while holding the cases of Nahaolelua v. Heen and Boeynaems v. Ah Leong to be rightly decided and reaffirming the ruling made therein that "when a futile attempt has been made to create an estate in fee tail it will take effect either as a fee simple or a life estate and remainder according to which appears to more nearly effect the intention of the grantor or testator," in holding that ordinarily such estate "will be held to take effect as a fee simple unless something appears which should send it the other way."

XVI.

That the Court erred in holding that in the case at bar "there is nothing tending to show a preference for a life estate and remainder," when the will provides and the trial court found that the testatrix intended, at the death of the first takers, the heirs of the body of either to take an interest which they would not take by descent.

XVII.

That the Court erred in holding that it must affirmatively appear that in the particular case a life estate and remainder would more nearly comply

with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind, or the devise would be held to take effect as a fee simple in the first taker, in that the same is inconsistent with the ruling in Nahaolelua v. Heen and Boeynaems v. Ah Leong, reaffirmed in this case, that the estate will be held to be one or the other "according to whether the one effect or the other will go merely towards carrying out the intention of the grantor or testator in each case." [60]

XVIII.

That the Court erred in holding that the principles of common law should be applied to test the character of fee tail estates in Hawaii, and particularly in ignoring the fact that an estate in tail in Hawaii could not be barred or conveyed by the first taker or that there are any provisions of the common law which would be in force under the law of Hawaii which would favor the first taker.

Dated Honolulu, T. H., Aug. 1st, 1917.

(Sgd.) CASTLE & WITHINGTON,
Attorneys for Plaintiff.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk. [61]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of judgment in said Supreme Court of the Territory of Hawaii, before you, in the case of Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Limited, Defendant, a manifest error has happened, to the great prejudice and damage of said Helen K. Kinney, petitioner and plaintiff, as is said and appears by the petition herein,—

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit [62] Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as

to have the same at the said place in said circuit thirty days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 1st day of August, 1917.

ATTEST my hand and seal of the Supreme Court of the Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed this 1st day of August, 1917.

[Seal] (Sig.) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk. [63]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,
Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America to the Oahu Sugar Company, Limited, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Helen K. Kinney is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court of the Territory this 1st day of August, 1917.

[Seal] (Sig.) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii. [64]

Service of a copy of the within citation upon me is hereby admitted this first day of August, A. D. 1917.

FREAR, PROSSER, ANDERSON & MARX,
Attorneys for Defendants in Error.

Service of copy of citation is hereby admitted, made 3:55 P. M. of August 1st, 1917.

THOMPSON & CATHCART,
By J. A. M.

Filed and issued for service August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant,

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That Helen K. Kinney, as principal, and Henry G. Winkley, as surety, are held and firmly bound unto the Oahu Sugar Company, Limited, in the penal sum of Three Hundred Dollars ($300), for the payment of which, well and truly to be made to said Oahu Sugar Company, Limited, we bind ourselves and our respective heirs, executors, administrators and assigns firmly by these presents.

The CONDITION of the above obligation is such that, whereas, on the 1st day of August, 1917, the above-bounden principal sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 28th day of June, 1917, by the Supreme Court of the Territory of Hawaii.

NOW, THEREFORE, if the said principal shall prosecute her said writ of error to effect and answer

all damages and costs if she fails to sustain her writ of error, then this obligation shall be void; otherwise [65] it shall remain in full force and effect.

In witness whereof, the said Helen K. Kinney, principal, and Henry G. Winkley, surety, have hereunto set their hands this 1st day of August, 1917.

(Signed.) HELEN K. KINNEY,
Principal.

(Sig.) HENRY G. WINKLEY,
Surety.

The foregoing bond is approved.

[Seal] (Sig.) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk. [66]

[Endorsed]: Original. No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Ltd., Defendant. Petition for Writ of Error, Assignments of Error, Writ of Error, Citation on Writ of Error and Bond on Writ of Error. Filed and issued for service August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk. Returned August 1, 1917, at 4:05 P. M. J. A. Thompson, Clerk. [67]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant,

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of judgment in said Supreme Court of the Territory of Hawaii, before you, in the case of Helen K. Kinney, plaintiff, vs. Oahu Sugar Company, Limited, defendant, a manifest error has happened, to the great prejudice and damage of said Helen K. Kinney, petitioner and plaintiff, as is said and appears by the petition herein,—

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit [68] Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as

to have the same at the said place in said Circuit thirty days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 1st day of August, 1917.

ATTEST my hand and seal of the Supreme Court of the Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed this 1st day of August, 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii. [69]

Filed August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,
Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America to the Oahu Sugar Company, Limited, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Helen K. Kinney is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court of the Territory this 1st day of August, 1917.

[Seal] A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii. [70]

Service of a copy of the within citation upon me is hereby admitted this 1st day of August, A. D. 1917.

[Seal]

FREAR, PROSSER, ANDERSON & MARX,

Attorneys for Defendants in Error.

Service of copy of citation is hereby admitted, made 3:55 P. M. of August 1st, 1917.

[Seal] THOMPSON & CATHCART,

By J. A. M.

Filed and issued for service August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk.

Returned August 1, 1917, at 4:05 P. M. J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

Stipulation of Facts Admitted on Writ of Error.

It is stipulated that on any appeal or writ of error taken to obtain a review of the decision and judgment of the above-entitled court in the above-entitled case, a transcript of the testimony and the exhibits in said case need not be taken up, but that on any such appeal or writ of error the following facts, among others, shall be considered as established by said testimony and exhibits:

The land which is the subject of this action is a part of the land known as Hanohano which was awarded by Land Commission Award No. 5930 to Puhalahua.

On November 20, 1873, said land of Hanohano and other lands were conveyed to Bernice P. Bishop for a consideration of $300.

On October 16, 1884, said Bernice P. Bishop died leaving a will and two codicils, which were duly pro-

bated and full, true and correct copies of which, marked respectively "A," "B" and "C," are hereto attached and made a part hereof. The land demised in the eleventh item of the first codicil is said land of Hanohano. [71]

On January 9, 1890, Kahakuakoi and Kealohapauole, who are named as devisees in said eleventh item of the first codicil, leased said land of Hanohano to Mark P. Robinson for fifty years from January 1, 1892, at an annual rental of $700, said date of January 1, 1892, being the date of the expiration of a then outstanding lease.

On December 15, 1890, said Kahakuakoi and Kealohapauole made a mortgage of said land of Hanohano and another piece of land to Charles R. Bishop, husband of said testatrix, and others, partners under the name of Bishop & Company, Bankers, for $3,000, a full, true and correct copy of which mortgage, marked "D" is hereto attached and made a part hereof.

On January 22, 1893, said mortgage having meanwhile been assigned to Peter Dalton and foreclosed by the executors of his will, said land of Hanohano was conveyed to said Charles R. Bishop, the purchaser at the foreclosure sale, at public auction, for $4,700.

On October 22, 1894, said Kahakuakoi and Kealohapauole and their children, George and Lydia, quitclaimed their interests in said land of Hanohano for a consideration of $5 to said Mark P. Robinson, a full, true and correct copy of which instrument marked "E" is hereto atached and made a part

hereof, and on the following day October 23, 1894, said Charles R. Bishop conveyed his right, title and interest in said land of Hanohano to said Mark P. Robinson for a consideration of $6,000.

On February 12, 1897, said Mark P. Robinson conveyed with warranty the portion of said land of Hanohano which is the subject of this action, to the Oahu Sugar Company, Limited, the defendant, for a consideration of stock of the par value of $150,000 in that company, which was organized at that time, and [72] the said Oahu Sugar Company, Limited, has since held possession of said land and used the same chiefly for artesian wells and pumping plants and the cultivation of sugar cane, a full, true and correct copy of such conveyance marked "F" is hereto attached and made a part hereof.

On August 17, 1906, John Paalua, for a consideration of $1, gave the plaintiff an option to purchase all of his right, title and interest in said land of Hanohano for $1,000 at any time within ninety days thereafter; and on July 20, 1914, said George and John Paalua for a consideration of $1 gave the plaintiff's husband a similar option to purchase for $1,000 all of their right, title and interest in said land of Hanohano at any time within a year thereafter, and, in case of pending litigation at the end of the year, for a further period of three months from final decree.

Said Kahakuakoi died on September 8, 1910, and said Kealohapauole died on June 8, 1914. Of their children who had not died before said will was made, one, born shortly before the will was made, died shortly after the testatrix died; another, Niulii, the

mother of the plaintiff, died December 12, 1890; two, said George and Lydia, survived said Kahakaukoi and Kealohapauole and are still living. Two grandchildren, namely, Helen, the plaintiff, and said John Paalua, children of the said Niulii, also survived said Kahakuakoi and Kealohapauole. Said John Paalua died February 12, 1915, unmarried and intestate.

Dated Honolulu, T. H., August 14, 1917.

CASTLE & WITHINGTON,
Attorneys for Plaintiff.

THOMPSON & CATHCART,
FREAR, PROSSER, ANDERSON & MARX,
Attorneys for Defendant. [73]

Exhibit "A"—Will of Bernice Pauahi Bishop, Dated October 31, 1883.

KNOW ALL MEN BY THESE PRESENTS, That I, Bernice Pauahi Bishop, the wife of Charles R. Bishop, of Honolulu, Island of Oahu, Hawaiian Islands, being of sound mind and memory, but conscious of the uncertainty of life, do make, publish and declare this my last Will and Testament in manner following, hereby revoking all former wills by me made:

First. I give and bequeath unto my namesakes, E. Bernice Bishop Dunham, niece of my husband, now residing in San Joaquin County, California, Bernice Parke, daughter of W. C. Parke, Esq., of Honolulu, Bernice Bishop Barnard, daughter of the late John E. Barnard, Esq., of Honolulu, Bernice Bates, daughter of Mr. Dudley C. Bates, of San Francisco,

California, Annie Pauahi Cleghorn of Honolulu, Lilah Bernice Wodehouse, daughter of Major J. H. Wodehouse, of Honolulu, and Pauahi Judd, the daughter of Col. Charles H. Judd, of Honolulu, the sum of Two Hundred Dollars ($200) each.

Second. I give and bequeath unto Mrs. William F. Allen, Mrs. Amoe Haalelea, Mrs. Antone Rosa, and Mrs. Nancy Ellis, the sum of Two Hundred Dollars ($200) each.

Third. I give and bequeath unto Mrs. Caroline Bush, widow of A. W. Bush, Mrs. Sarah Parminter, wife of Gilbert Parmenter, Mrs. Keomailani Taylor, wife of Mr. Wray Taylor, to their sole and separate use free from the control of their husbands, and to Mrs. Emma Barnard, widow of the late John E. Barnard Esq., the sum of Five Hundred Dollars ($500) each.

Fourth. I give, devise and bequeath unto H. R. H. Liliuokalani, the wife of Gov. John O. Dominis, all of those tracts of land known as the "Ahupuaa of Lumahai," situated on the Island of Kauai, and the "Ahupuaa of Kealia," situated in South [74] Kona Island of Hawaii; to have and to hold for and during the term of her natural life; and after her decease to my trustees upon the trusts below expressed.

Fifth. I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of Thirty Dollars ($30) per month, (not $30 each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called "Mauna

Kamala," situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed.

Sixth. I give and bequeath unto Mrs. Kapoli Kamakau, the sum of forty dollars ($40) per month during her life; to my servant-woman Kaia the sum of Thirty Dollars ($30) per month during her life; and to Nakaahiki (w) the sum of Thirty Dollars ($30) per month during her life.

Seventh. I give, devise and bequeath unto Kapaa (k) the house-lot he now occupies, situated between Merchant and Queen Streets in Honolulu, to have and to hold for and during the term of his natural life; upon his decease to my trustee upon the trusts below expressed.

Eighth. I give, devise and bequeath unto Auhea (w) the wife of Lokana (k) the house-lot situated on the corner of Richard and Queen Streets, not occupied by G. W. Macfarlane & Co.; to have and to hold for and during the term of her natural life; upon her decease to my trustees upon the trusts below expressed.

Ninth. I give, devise and bequeath unto my husband, Charles R. Bishop, all of the various tracts and parcels of land situated upon the Island of Molokai, comprising the "Molokai Ranch," and all of the live-stock and personal property [75] thereon; being the same premises now under the care of R. W. Meyer, Esq., and also all of the real property wherever situated, inherited by me from my parents, and also all of that devised to me by my aunt Akahi, except the two lands above devised to H. R. H.

Liliuokalani for her life; and also all of my lands at Waikiki Oahu, situated makai of the government road leading to Kapiolani Park; to have and to hold together with all tenements, hereditaments, rights, privileges and appurtenances to the same appertaining, for and during the term of his natural life; and upon his decease to my trustees upon the trusts below expressed.

Tenth. I give, devise and bequeath unto Her Majesty Emma Kaleleonalani, Queen Dowager, as a taken of my goodwill, all of the premises situated upon Emma Street in said Honolulu, known as "Kaakopua," lately the residence of my cousin Keelikolani; to have and to hold with the appurtenances for and during the term of her natural life; and upon her decease to my trustees upon the trusts below expressed.

Eleventh. I give and bequeath the sum of Five thousand Dollars ($5000) to be expended by my executors in repairs upon Kawaiahao Church building in Honolulu, or in improvements upon the same.

Twelfth. I give and bequeath the sum of Five thousand Dollars ($5000) to be expended by my executors for the benefit of the Kawaiahao Family School for Girls (now under charge of Miss Norton) to be expended for additions either to the grounds, buildings or both.

Thirteenth. I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and [76]

maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings, and in furnishing the same with the necessary and appropriate fixtures, furniture and apparatus. I direct my trustees to invest the remainder of my estate in such manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers, the repairing buildings and other incidental expenses; and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above mentioned to be determined solely by my said trustees, they to have full discretion. I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to

my said trustees may seem best. I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the [77] government of said schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of a majority of said trustees.

I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some newspaper published in said Honolulu; I also direct my said trustees to keep said school buildings insured in good companies, and in case of loss to expend the amounts recovered in replacing or repairing said buildings. I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular Sect of Protestants.

Fourteenth. I appoint my husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke, and William O. Smith, all of Honolulu, to be my trustees to carry into effect the trusts above specified. I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my said trustees shall be kept at five; and that vacancies shall

be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

Fifteenth. In addition to the above devise to Queen Emma, I also give, devise and bequeath to her, said Emma Kaleleonalani [78] Queen Dowager, the Fish-pond in Kawaa, Honolulu near Oahu Prison, called "Kawa," for and during the term of her natural life; and after her decease to my trustees upon the trusts aforesaid.

Sixteenth. In addition to the above devise to my husband, I also give and bequeath to him, said Charles R. Bishop, all of my personal property of every description, including cattle at Molokai; to have and to hold to him, his executors, administrators and assigns forever.

Seventeenth. I hereby nominate and appoint my husband Charles R. Bishop and Samuel M. Damon, executors of this my will.

In witness whereof I, said Bernice Pauahi Bishop, have hereunto set my hand and seal this thirty-first day of October A. D. Eighteen hundred and eighty-three.

(Signed) BERNICE P. BISHOP. (L. S.)

The foregoing instrument, written on eleven pages, was signed, sealed (published and declared by said Bernice Pauahi Bishop, as and for her last will and testament in our presence, who at her request, in her presence, and in the presence of each other, have hereunto set our names as witnesses thereto, this 31st day of October, A. D. 1883.

(Signed) F. W. MACFARLANE.

(Signed) FRANCIS M. HATCH. [79]

Exhibit "B"—First Codicil to the Will of Bernice Pauahi Bishop, Dated October 4, 1884.

This is a Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first A. D. Eighteen hundred and eighty-three.

1st. I give and bequeath unto Mrs. William F. Allen the sum of One thousand Dollars ($1000) in place of the amount given to her in my said will.

2d. I revoke the devise to Her Majesty Emma Kaleleonalani of the premises situated upon Emma Street in Honolulu, known as "Kaakopua," contained in the tenth article of my said will; and in place thereof I give, devise and bequeath unto her, said Emma Kaleleonalani, all of those parcels of land situated in Nuuanu Valley, Oahu, on both sides of the road, known as "Laimi"; to hold for and during the term of her natural life; and upon her decease to my trustees upon the trusts expressed in my said will. Said Emma to also have the fish pond known as "Kawa," as provided in the fifteenth article of my said will.

3d. In addition to the bequests to my husband named in my said will I also give, devise and bequeath unto my said husband, Charles R. Bishop, the land known as Waialae-nui, as well as Waialae-iki and also the land known as "Maunalua," Island of Oahu; and also all of the premises situated in said Honolulu, known as the Ili of "Kaakopua," extending from Emma to Fort Street and also all kuleanas in the same, and everything appurtenant to said premises; to hold for his life, remainder to my trustees.

4th. I give, devise and bequeath unto Kuaiwa (k) and Kaakaole (w) old retainers of my parents, that piece of land now occupied by them, situated in upper Kapalama, in said Honolulu, called "Wailuaakio"; to have and to hold for and during the term of their natural lives and that of the survivor of [80] them; remainder to my trustees upon the trusts named in my said will.

5th. I give, devise and bequeath unto Kaluna (k) and Hoopii, his wife, those premises now occupied and cultivated by them in Kauluwela, Liliha Street, Honolulu; to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees upon the trusts named in my said will.

6th. I give, devise and bequeath unto Naiapaakai (k) and Loika Kahua his wife, that lot of land now enclosed and occupied by them, in Kauluwela in said Honolulu, the size of said lot not to exceed one acre; to have and to hold for and during the term of their natural lives, and that of the survivor of them; remainder to my trustees upon the trusts named in my said will.

7th. I give and bequeath unto Lola Kahailiopua Bush, of said Honolulu, the sum of Three hundred Dollars ($300) per year during her minority, to be applied towards her education and clothing; and upon her becoming of age the sum of One thousand Dollars ($1000) to her sole and separate use, free from the control of any husband she may marry.

8th. I give and bequeath unto Bernice B. Barnard, of said Honolulu, the sum of Three hundred

Dollars ($300) a year during her minority, to be applied towards her education and clothing; and upon her becoming of age the sum of One Thousand Dollars ($1000) to her sole and separate use, free from the control of any husband she may marry. This in lieu of the $200 given by my will.

9th. I give, devise and bequeath unto my friend Samuel M. Damon, of said Honolulu, all of that track of land known as [81] the Ahupuaa of Moanalua, situated in the District of Honolulu, Island of Oahu; and also the fishery of Kaliawa; to have and to hold with the appurtenances to him, his heirs and assigns forever.

10th. I give and bequeath unto my servants Kaleleku (k) and Kaoliko (k) his brother, each the sum of Twenty Dollars ($20) per month, during the term of the natural life of each of them.

11th. I revoke so much of the fifth article of my said will as devises the land known as "Mauna Kamala" to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will.

12th. I give and bequeath unto the Bishop's School in Honolulu, called "Iolani College," the sum of Two Thousand Dollars ($2000); and to the English Sisters School, called "St. Alban's Priory" the sum of Two thousand Dollars ($2000), and to "St. Andrews Church" in Honolulu, the sum of Two thousand Dollars ($2000).

13th. I give, devise and bequeath unto Kaiulani Cleghorn, daughter of A. S. Cleghorn, of Honolulu, all of that parecel of land and spring situated at Waikiki-uka, Oahu, known as Kanewai; to have and to hold for and during the term of her natural life; remainder to my trustees upon the trusts named in my said will.

14th. I give and bequeath unto the Rev. Henry H. Parker, of Honolulu, the sum of five hundred dollars ($500).

15th. I give and bequeath unto Mary B. Collins, if she be with me at the time of my death, the sum of Two hundred Dollars [82] ($200); and unto Maggie Wynn, if she be then with me, the sum of One hundred Dollars ($100).

16th. I hereby give the power to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent however, after such decease to be paid to my executors or trustees; provided however that no rent be collected for a longer period in advance at any one time than for six months, and no bonus be taken by said devisees, or any of them, on account of such leases or lease; in either of which cases such lease or leases shall cease and determine, at the option of my executors or trustees, upon the death of such devisee or devisees, who shall have collected rent for a longer period in

advance than for six months, or who shall have taken such bonus.

17th. I give unto the trustees named in my said will the most ample power to sell and dispose of any lands or other portion of my estate, and to exchange lands and otherwise dispose of the same; and to purchase land, and to take leases of land whenever they think it expedient, and generally to make such investments as they consider best; but I direct that my said trustees shall not purchase land for said schools if any lands come into their possession under my will which in their opinion may be suitable for such purpose; and I further direct that my said trustees shall not sell any real estate, cattle ranches, or other property, but to continue and manage the same, unless in their opinion a [83] sale may be necessary for the establishment or maintenance of said schools, or for the best interest of my estate. I further direct that neither my executors nor trustees shall have any control or disposition of any of my personal property; it being my will that my husband, Charles R. Bishop, shall have absolutely all of my personal property of every description. And I give unto my executors named in my said will full power to sell any portion of my real estate for the purpose of paying debts or legacies without obtaining leave of Court; and to give good and valid deeds for the same, the purchasers under which are not to be responsible for the application of the purchase money.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this fourth day of October A. D. Eighteen Hundred and eighty-four. The

words "to hold for his life, remainder to my trustees" interlined an 2d page, before signing.

(Signed) BERNICE P. BISHOP. (L. S.)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament, in our presence, who at her request, in her presence and in the presence of each other, have subscribed our names as witnesses thereto.

October 4, 1884.

(Signed) WILLIAM W. HALL.

(Signed) FRANCIS M. HATCH. [84]

Exhibit "C"—Second Codicil to the Will of Bernice Pauahi Bishop, Dated October 9, 1884.

This is a second Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first, A. D. Eighteen hundred and eighty-three:

1st. In addition to the lands devised in the fourth article of my said will to H. R. H. Liliuokalani, the wife of John O. Dominis, I also give, devise and bequeath unto her, said Liliuokalani, all of that tract of land situated in the District of Honolulu, Island of Oahu, adjoining Waialae-nui, known as "Kahala," together with the buildings thereon, and the fishing rights appurtenant thereto; to have and to hold for and during the term of her natural life, remainder to my trustees upon the trusts named in my said will.

2d. In addition to the house lot devised to Kapaa (k), in the seventh article of my said will, which house lot was formerly the property of his wife Akahi, I also give, devise and bequeath unto him, said Kapaa, (k) all of that parcel of land adjoining said house-lot, fronting on Queen Street and extending to

Richards Street, and now under lease to Henry R. Macfarlane; he, said Kapaa, to pay the taxes upon the same and upon the parcel devised by me to Auhea; to have and to hold for and during the term of the natural life of him said Kapaa; remainder to my trustees, upon the trusts named in my said will.

3d. I revoke the devise to Auhea (w) wife of Lokana, set forth in the eighth article of my said will. And I give, devise and bequeath unto said Auhea, that house lot situated on *on* said Richards Street, (not on the corner of Queen Street) formerly occupied by said Auhea, and which was formerly the dwelling of Akahi; the same adjoining the [85] premises under lease to Henry R. Macfarlane but not included in said lease; to have and to hold for and during the term of the natural life of her, said Auhea, free from the control of her husband; remainder to my trustees upon the trusts named in my said will.

4th. Of the two schools mentioned in the thirteenth article of my said will, I direct that the school for boys shall be well established and in efficient operation before any money is expended, or anything is undertaken on account of the new school for girls. It is my desire that my trustees should do thorough work in regard to said schools as far as they go; and I authorize them to defer action in regard to the establishment of said school for girls, if in their option from the condition of my estate it may be expedient, until the life estates created by my said will have expired, and the lands so given shall have fallen into the general fund. I also direct that my said trustees shall have power to determine

to what extent said schools shall be industrial, mechanical, or agricultural; and also to determine if tuition shall be charged in any case.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this ninth day of October, A. D. 1884.

(Signed) BERNICE P. BISHOP. (L S.)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto. October 9th, 1884.

(Signed) G. TROUSSEAU,

(Signed) J. BRODIE. [86]

Supreme Court of the Hawaiian Islands.

I hereby certify that the foregoing is a full and true copy of the original will with two codicils of Bernice P. Bishop, on file in the clerk's office of said court, and that said will was duly admitted to Probate by said court on the second day of December, 1884.

Witness my hand and the seal of said court at Honolulu, this 15th day of December, A. D. 1884.

HENRY F. POOR,

Second Deputy Clerk Supreme Court.

Admitted to Probate December 2, 1884. [87]

Exhibit "D"—Mortgage, Dated December 15, 1890, Kahakuakoi et al. to Charles R. Bishop et al.

(Stamped $3.00)

KNOW ALL MEN BY THESE PRESENTS: That we, KAHAKUAKOI (w) in her own right

and KEALOHAPAUOLE, her husband, of Honolulu, Island of Oahu, in consideration of Three Thousand Dollars ($3,000) to us paid by CHARLES R. BISHOP, JOHN H. PATY and SAMUEL M. DAMON, partners and doing business under the firm name of Bishop & Company, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Bishop & Company, FIRST: All of that tract of land situated in Kaliu in said Honolulu, being the same premises conveyed to said Kahakuakoi by deed of M. Aona dated May 15th, 1889, recorded in the Registry Office in Honolulu, Liber 112, pages 486–7. SECOND: All that tract of land known as Hanohano, situated in the District of Ewa, Oahu, described in L. C. A. 5930, to Puhalahua being the same premises devised to us by will of B. Pauahi Bishop. To Have and to Hold the granted premises with all the tenements, hereditaments, rights, privileges, and appurtenances to the same belonging, and all the right, title, estate and interest of every nature whatsoever in law or in equity of either or both of us, dower right of dower, courtesy and homestead and as to the premises second hereinbefore described freed and discharged from any estate tail of us and all remainder estates and powers to take effect after the determination or in defeasance of such estate tail unto said Bishop & Co, and their heirs and assigns forever. Provided nevertheless that if we or our heirs, executors and administrators or assigns shall pay unto the grantees or their executors, administrators or assigns Three Thousand Dollars ($3,000) in Two

years from this date according to the tenor of our joint and several promissory notes of even date hereof, with interest at the rate of Nine per cent per annum, net above taxes, payable semi-annually and [88] until such payment shall pay all taxes and assessments in the granted premises and the debt hereby secured without charge to the grantees and shall not make or suffer any strip or waste of the granted premises, then this deed as also said note whereby we promise to pay the said principal and interest at the times aforesaid shall be void. But in case we or our heirs or assigns shall fail to pay said interest semi-annually or shall suffer any breach of any of the above conditions, then this note shall become at once due and payable and upon such breach or default or upon nonpayment of said note when due, said grantees, their heirs, representatives or assigns may forthwith enter upon and take possession of all said granted premises and receive the rents and profits thereof or may without first taking possession thereof foreclose this mortgage by suit in equity or sell said granted premises or any part thereof as a whole or in lots with all improvements that may be thereon at public auction in Honolulu, or at such other place as they deem will bring the best price, first publishing such notice of intention to foreclose, of the time and place of sale in the English and Hawaiian languages for three consecutive weeks as is provided by law, and may become purchasers at such sale and as our attorneys in fact irrevocably constituted and appointed may execute and deliver good and sufficient deed or deeds of sale

thereof and may do and perform all other acts and things that may be necessary to carry out this power of sale and such sale shall forever bar us from all interest in the granted premises whether at Law or in Equity, and may apply the proceeds of such sale first to the payment of all costs and expenses of sale or sales as aforesaid with a counsel fee, and then to the payment of all sums then secured hereby whether then or thereafter payable.

In witness whereof we hereunto set our hands and seals this [89] 15th day of December, 1890.

(Sgd.) KAHAKUAKOI.

Kona

" D. KEALOHAPAUOLE. X

Kaha

IMUA o
S. M. KAAUKAI.

Hawaiian Islands,
Island of Oahu,—ss.

On this 1st day of December, 1890, personally appeared before me Kahakuakoi and D. Kealohapauole, her husband, to me known and known to me to be the persons described in and who executed the foregoing instrument and severally acknowledged that they executed the same freely and voluntarily for the uses and purposes therein set forth. And said Kahakuakoi on an examination separate and apart from her husband acknowledged that she executed the same freely without fear or compulsion of her said husband.

[Seal] (Sgd.) J. ALFRED MAGOON,
Notary Public.

Recd. and Compd. this 15th day of Dec., A. D. 1890, at 3:45 o'clock P. M. Malcolm Brown, Deputy Registrar of Conveyances. **[90]**

Exhibit "E"—Deed Dated October 22, 1894, Kahakuakoi et al. to M. P. Robinson.

KAHAKUAKOI et al.

to

M. P. ROBINSON.

DEED dated October 22, 1894.
BOOK 148, page 402.
CONS. $5.00.
(Stamped $1.00)

This Indenture made this twenty-second day of October, A. D. 1894, by and between Mrs. Kahakuakoi, David Kealohapauole, George Kealohapauole and Lydia Kamae Kealohapauole, all of Honolulu, Island of Oahu, Hawaiian Islands, of the first part, and Mark P. Robinson of said Honolulu, of the second part, Witnesseth: That the parties of the first part in consideration of Five Dollars ($5.00) to them paid by the party of the second part, the receipt whereof is acknowledged, have given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell and convey unto said party of the second part, his heirs and assigns, All their right, title, interest and estate vested, contingent or in expectancy in and to all that tract of land known as Hanohano situated in the District of Ewa, in said Island of Oahu, being the same premises described in Land Commission Award 5930 to Puhalahua, being the same premises devised to the parties

of the first part by the will of Bernice Pauahi Bishop. And also all of the tenements, hereditaments, rents, reversions, privileges, and appurtenances, and all of their right, title and estate in law or in equity, vested contingent or in expectancy, in and to said premises, or to the same appertaining.

To Have and To Hold with the Appurtenances to him, said party of the second part, his heirs and assigns, for his and their use and behoof forever.

In Witness Whereof said parties of the first part have hereunto set their hands and seals the day and year first **[91]** above written; said David Kealohapauole being the husband of Mrs. Kahakuakoi.

KAHAKUAKOI.
D. KEALOHAPAUOLE.
G. KEALOHAPAUOLE.
LYDIA KAMAE KEALOHAPAUOLE.

In the presence of
N. FERNANDEZ.

Ack. Oct. 22, 1894, by N. Fernandez, Notary Public. Rec. Oct. 23, 1894, at 3:37 o'clock P. M. Thos. G. Thrum. **[92]**

Exhibit "F"—Deed Dated February 12, 1897, Mark P. Robinson to Oahu Sugar Company.

(Stamped $1.00.)

KNOW ALL MEN BY THESE PRESENTS: That I, Mark P. Robinson, widower residing in Honolulu, Island of Oahu, in consideration of Fifteen Hundred paid up shares of the capital stock of the Oahu Sugar Company, Limited, a corporation established and existing under the laws of the

Hawaiian Islands of the par value each of One Hundred Dollars, issued and delivered to me by the said corporation; the receipt whereof is hereby acknowledged, do hereby give, grant, sell and convey unto the said corporation, the Oahu Sugar Company, Limited, all the land situate in the District of Ewa, known as Hanohano being the same premises described in L. C. A. 5930 to Puhalakua excepting a portion thereof on the upper or mauka end cut off by the new division or boundary line of Waipio and Koalipea; the portion of said land of Hanohano hereby conveyed being bounded and described as follows:

Beginning at a marked rock near the Waikele River, at the mauka corner of Ulumanu, the boundary runs by the magnetic meridian as follows, viz.:

N. 2° 00′ E. 594 ft. along Aualii Gr. 712.
N. 60° 00′ W. 1346 ft. along Aualii Gr. 712.
N. 68° 00′ W. 264 ft. along Aualii Gr. 712.
N. 24° 00′ W. 726 ft. along Aualii Gr. 712.
N. 4° 00′ W. 792 ft. along Aualii Gr. 712.
N. 24° 00′ W. 396 ft. along Aualii Gr. 712.
N. 34° 30′ E. 924 ft. along Aualii Gr. 712.
N. 8° 30′ W. 1399 ft. along Aualii Gr. 712.
N. 25° 00′ E. 670 ft. along Aualii Gr. 712.
N. 30° 00′ W. 1023 ft. along Aualii Gr. 712.
N. 39° 00′ W. 264 ft. along Aualii Gr. 712 along Pali to the rock called "Uhakai" at the junction of the Kipapa and Keaakukui gulches.

N. 71° 00′ W. 300 feet, more or less, down to pali to a point in the gulch, on the boundary of Pouhala.

S. 19° 00′ W. 950 feet, more or less; across the stream up the pali to a point on the west bank of the

Keaakukui gulch; on the boundary of Pouhala.

S. 12° 30′ W. 914 ft. along R. P. 4486 along Pali

S. 13° 30′ E. 755 ft. along the same.

S. 14° 30′ W. 1463 ft. along the same.

S. 23° 00′ E. 1036 ft. along the same.

S. 17° 30′ E. 235 ft. along the same to a marked rock, on the edge of the Pali, called "Pohakupili."

N. 79° 00′ E. 231 ft. down to marked rock at the foot of the Pali at the bend of the river, along Waipahu, Gr. 122.

Thence along the river which separates this land from Waipahu to the initial point. Area 145 4/10 acres more or less.

Together with all water rights, flumes, banana houses, engine and [93] engine houses, pumps, boilers and growing crops on said land or belonging thereto. And for the consideration aforesaid I do further sell, grant, and convey unto the said Oahu Sugar Company, Limited, all of the Waipahu Springs (so called) in said land of Hanohano and the water rights thereof and the exclusive and perpetual right to appropriate and use the same and the waters thereof.

TO HAVE AND TO HOLD all and singular the above conveyed premises, water rights and property aforesaid unto the said Oahu Sugar Company, Limited, and its successors and assigns forever.

AND I do hereby for myself, my heirs, executors and administrators covenant with the grantee, its successors and assigns that I am lawfully seized in fee simple of and own all the premises, springs and property aforesaid; that the same are free and clear

of all encumbrances; that I have good right to sell and convey the same as aforesaid, and that I will and my heirs, executors and administrators shall warrant and forever defend the same unto the grantee, its successors and assigns forever against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 12th day of February, A. D. 1897.

MARK P. ROBINSON,

Hawaiian Islands,
Island of Oahu,—ss.

On this 12th day of February, A. D. 1897, personally appeared before me Mark P. Robinson, known to me to be the person described in and who executed the foregoing instrument, who duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

HARRIET E. WILDER,
Notary Public.

Recorded and compared this 28th day of April, A. D. 1897, at 11:15 o'clock A. M. Thos. G. Thrum, Registrar of Conveyances. [94]

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Ltd., Defendant. Stipulation. Filed August 18, 1917, at 11:05 A. M. J. A. Thompson, Clerk. [95]

In the Supreme Court of the Territory of Hawaii.

HELEN K. KINNEY,

Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant in Error.

Certificate of Clerk to Transcript of Record and Return to Writ of Error.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 68 to 69, both inclusive, of the foregoing transcript, and in pursuance to the praecipe to me directed, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 67, both inclusive, and I CERTIFY the same to be full, true and correct copies of the pleadings, record, entries and final judgment which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii in a cause entitled in said court "Helen K. Kinney, Plaintiff in Error, vs. Oahu Sugar Company, Limited, a Corporation," Numbered 1005.

I FURTHER CERTIFY that the original Citation on writ of error and acknowledgments of service

of copy thereof by Messrs. Frear, Prosser, Anderson & Marx, and by Messrs. Thompson & Cathcart, attorneys for the defendant in error, being page 70 of the foregoing transcript, is hereto attached and herewith returned. [96]

I ALSO FURTHER CERTIFY that the original stipulation of facts admitted on writ of error, with Exhibits "A" to "F" thereto attached, being pages 71 to 95, both inclusive, of the foregoing transcript, are hereto attached and herewith transmitted to the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

I LASTLY CERTIFY that the cost of the foregoing transcript is nineteen and 50/100 ($19.50) Dollars, and that said amount has been paid by the plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 21st day of August, A. D. 1917.

[Seal] JAMES A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.
[97]

[Endorsed]: No. 3042. United States Circuit Court of Appeals for the Ninth Circuit. Helen K. Kinney, Plaintiff in Error, vs. Oahu Sugar Company, Limited, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed August 28, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.